Supreme Court of the United States

OCTOBER TERM, 1948

No. ------

SAM ZIMMERMAN, PETITIONER,

vs.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

INDEX

	Page
Oral Opinion of the Criminal Court of Baltimore City	1
Ruling Appealed From to the Court of Appeals of Maryland	9
Testimony of Edward R. Folger	9-12, 51-54
Chief Judge W. Conwell Smith	13-22, 54-56
Edward R. Folger (recalled)	22-23, 56-60
Lawrence R. Mooney	23-29, 61-62
Edward R. Folger (recalled)	63
Hon. Samuel K. Dennis	30-35
Judge J. Abner Sayler	35-38
Judge Emory H. Niles	39-44, 64-66
Chief Judge W. Conwell Smith (reappearance)	44-49
Opinion of the Court of Appeals of Maryland (Henderson, J.)	67

Note—This "Transcript of Record" is not a complete copy of the official, certified Transcript filed with the Clerk of this Court with the Petition for Certiorari and Brief, but is a consolidation of the appendices to the briefs filed by Petitioner and Respondent in the Court of Appeals of Maryland, together with the Opinion of the Court of Appeals of Maryland, and is filed for the convenience of this Court in considering the Petition for Certiorari herein, Petitioner having requested leave to proceed *in forma pauperis*.

Order granting motion for leave to proceed in forma pauperis; granting petition for certiorari and transferring case to appellate docket 76

POOR COPY

BLEED THROUGH

APPENDIX TO APPELLANT'S BRIEF NO. 177.

OPINION OF THE LOWER COURT.

(Tr. pp. 175-189):

Gentlemen, owing to other pressure in this Court I shall deliver an oral opinion now rather than wait and write a formal opinion.

THE MOTION—A motion was filed by counsel for Sam Zimmerman to quash the indictment on the ground that the Grand Jury was not selected in accordance with the laws and requirements of the Charter and Public Local Laws of Baltimore City, and in violation of the rights guaranteed to the accused by the Constitution of the United States and the State of Maryland.

CITATIONS—Here are some of the applicable citations: Carter vs. Texas, 177 U. S. 587; Smith vs. Texas, 311 U. S. 128; Corpus Juris Secundum, Grand Juries, Section 12, page 1003—etc.; 19 Boston University Law Review, 413; 29 Illinois Law Review, 498; 30 Journal of Criminal Law and Criminology, page 264; Lee vs. State, 163 Md. 56; the various Jackson cases—180 Md. 658, 133 Fed. 2d. 476, 47 Fed. supplement, 362, 319 U. S. 746. The Charter and Public Local Laws of Baltimore City, as codified in the 1938 volume, and the Supreme Bench Rules. In these cases just mentioned are cited a host of cases that I am not now especially enumerating as I would if I were filing a formal opinion.

THE LAW—The law is well settled that discrimination against negroes in the selection of Grand Jurors is ground for reversal of the conviction of a negro. Systematic exclusion of negroes from Grand Jury service constitutes unconstitutional discrimination.

Officials charged with the drawing or selection of Grand Jurors are vested with a wide discretion in their selection and in determining their fitness. They must,

however, exercise impartiality in the performance of their duty. The presumption is that these officers have performed their duty, and discrimination must be established by competent evidence. The absence of negroes on a particular grand jury, or the fact that negroes are not placed on grand juries in the proportion that they bear to the white population, does not of itself show discrimination.

Whether race discrimination was practiced is an issue of fact, to be established by testimony with some degree of certainty to overcome the presumption that the officials in the discharge of their duty complied with the law.

Judge Ritchie said, in Cooper versus State. 64 Md., 40 cited with approval in Lee vs State, 163 Md. 56, that "to place colored persons on a jury simply because they are colored men would be a violation of the law as well as to exclude them for that reason."

In the Lee case our Court of Appeals said: "No positive action at all is required as a performance of the duty imposed by the constitution; it requires purely a negative, theabstaining from exclusion of negroes from the competition of qualifications for selection of jurors, and the chance of gaining places on panels. Indeed, any selection of a negro because he is a negro, or any special consideration given to his race, would be a violation of the law for selecting juries."

Our Courts have said that it is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

The local laws relating to the selection of jurors are directory and mandatory, and the rules of the Supreme Bench follow the public local laws.

CONTENTIONS OF THE ACCUSED—The traverser contends that the Supreme Bench in its selection of

POOR COPY

BLEED THROUGH

Grand Jurors has named only one negro to the Grand Jury and this has been a deliberate practice following a pattern, and that it is a discriminatory action justifying the quashing of the indictment.

FINDINGS—The general system of selecting jurors in Baltimore City was very well stated by Judge Chesnut in his opinion in the Jackson case and again by Judge Soper for the Circuit Court of Appeals in the same case. True, they were dealing with petit jurors. Judge Chesnut said that in the selection of petit jurors in Baltimore City, "There has been no intentional and systematic exclusion of negroes from juries in Baltimore City; and no discrimination against them in practice on account of race and color in the selection of juries by the Supreme Bench of Baltimore City."

Counsel for the traverser offered to show through former members of the Supreme Bench that up until 1944, perhaps even 1945, "it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one."

And further that "It was the established, recognized, accepted and deliberate practice of the Supreme Bench, accepted as its final selection as the colored member of the Grand Jury, that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench * * *".

If the present selection of members of the Grand Jury followed any such pattern as that claimed by the accused, then the testimony of these former judges would have been admissible. But, if the pattern from 1945 to date is different then the testimony is not admissible.

The accused in this case was indicted by the May Term, 1946 Grand Jury. As a matter of fact, of the 23 Grand Jurors originally selected to the May Term of

1946 Grand Jury by the Supreme Bench and notified to appear by the Sheriff, two were negroes, namely, Willard W. Allen and John L. Berry. Both of these gentlemen asked to be excused from serving.

No effort is made by the Supreme Bench to compel persons to serve on the Grand Jury if they find the duty too burdensome. The reasons are these: Service on the Grand Juries of Baltimore City is for a period of four months. Petit jury service is only for three weeks. Grand Jurors serve every day of the week, except Saturdays and Sundays. They must be present at ten o'clock, and usually the entire morning is taken up by service in the Grand Jury room. In addition they spend a great deal of their time visiting various State institutions and places of public assemblage and do devote much time to their tasks as Grand Jurors.

It is apparent that many persons, particularly professional men, employees, business men who have what we call a "single man business", business men whose time and business require them to be at their place of business or suffer undue hardships, and employees who cannot be replaced for such a long period, and many others are unable to serve because of the sacrifice required.

Therefore these two men, Allen and Berry, along with others named to the Grand Jury from time to time, asked to be excused. They were excused without any further ado. And in their place T. Wallace Lansey, Sr., Negro, and one white person were selected by the Supreme Bench at a special meeting called for that purpose to fill these vacancies.

The Supreme Bench always hold a special meeting after the Judge presiding in Criminal Court Part I notifies the Chief Judge that any persons selected are unable to serve. These special meetings are called promptly and new selections are made.

POOR COPY

We find in the January Term, 1945 Grand Jury two negroes served, namely, Edward Richard Blake and W. Emmett Coleman.

In the September Term, 1945 Grand Jury two Negroes, namely, Edward N. Wilson and Robert James Young served.

As Judge Smith has said, since he was Chief Judge in 1945, we have had seven Grand Juries. There have been eleven Negroes who have been actually selected and named by the Supreme Bench to serve thereon. Two asked to be excused, so actually nine served on the Grand Juries since 1945.

The lists of names submitted by the Judges to the Chief Judge out of which the ultimate nominations were made contained, as testified by Chief Judge Smith, as many as six Negroes.

The record also shows that these men were nominated by different Judges and not by any particular Judge.

The charge that the Grand Jury consists of "One, no more than one, and not less than one" Negro is just not substantiated by the record.

As Judges Soper and Chesnut pointed out in their opinions, the fact that the percentage of negroes serving on Petit juries is not in proportion to population is due to certain factors which must be taken into consideration. Negroes comprise about 19% of the population of Baltimore City. Many, however, are disqualified from serving on juries for various reasons, such as illiteracy, criminal records, or other reasons. The details are set out in both Judge Soper's and Judge Chesnut's opinions and apply to the Grand Jury with the same force as the petit jury.

Mr. Folger, the Jury Clerk, is completely free from any bias. He has exercised neither conscious nor unconscious discrimination against Negroes in the selection of jurors.

I can hardly believe that the former Judges whom counsel offered to have testify would have stated what counsel said in his offer of proof, but if it were so, then I am sure they will be glad to know that the Supreme Bench as presently constituted is selecting Grand Juries differently.

Each member of the Supreme Bench of Baltimore submits to the Chief Judge a list of names of persons deemed qualified to serve on the Grand Jury. No specific number of names is required to be submitted by any one Judge. Some submit more than others. These names are turned over to the jury clerk. Mr. Folger then checks his "Service Files" that is, the record in his office, to determine if these persons have served on juries before and to obtain certain necessary information such as occupation, age, etc. It so happens that practically every name submitted in the list to the Chief Judge for the May Term, 1946 Grand Jury was already in the service file of the jury clerk. This list runs, according to Judge Smith, from 1945 to date, from forty-three to fifty-four names for each Grand Jury. With the additional information furnished by the jury clerk this list is returned to each Judge. Then a Supreme Bench meeting is held. Each Judge usually nominates two persons to serve on the Grand Jury. If any objection is made to a particular individual by any Judge, he is not selected. Sometimes members of the Supreme Bench do not nominate from the lists that they themselves have submitted, but select persons originally nominated by another Judge.

Efforts have been made to secure a large base list from which to name persons for the Grand Jury, particularly negroes. Judge Niles, for example, who served as Chief Officer of the Rationing Boards of Baltimore City, was able to compile a list of colored citizens who voluntarily gave up their time to serve in the war effort. Persons from this list have been named from time to time, and it was Judge Niles who nominated some of them to serve on Grand Juries.

POOR COPY

BLEED THROUGH

The Supreme Bench of Baltimore City has sought to avoid both discrimination in the selection of Grand Jurors, and even the appearance of discrimination.

There was a time, as every trial lawyer knows, when the letter "C" indicating "Colored", appeared after the names of Negroes on the printed lists of petit jurors furnished to counsel. In 1945, the Supreme Bench ordered this letter "C" stricken from the printed lists. This was done by the Supreme Bench voluntarily, on its own motion, without suggestion from any individual or group. In the printed petit jury lists there is now no indication of any kind as to whether the juror is white or colored. And in striking a jury, a lawyer does not know from the printed list whether an individual is white or colored.

No list is furnished to the public which shows whether any members of the Grand Jury are white or colored. True, the Supreme Bench itself receives a list of nominations which the individual members of the Bench alone have, containing the name, address, occupation, age, previous jury service, and whether the person is white or colored.

The Supreme Bench of Baltimore is not discriminating against Negroes in the selection of Grand Jurors. Since 1944 the present Bench has contained many new members, more than a majority. Many changes with respect to practice have taken place. For example, as Judge Smith pointed out, the Supreme Bench of Baltimore now meets weekly at a luncheon meeting, and sometimes more frequently. Many problems are discussed, including the entire method of the selection of jurors with the sole idea in mind of bringing about an improvement in our system. As a result of these meetings of the Bench, we have codified and rewritten all of the rules of the Supreme Bench, something that has not been done, I suppose, over many decades. In addition, we have taken an interest in the condition of the Court House so that there is presently to be placed before the public a loan for the reconstruction and modernization of the Court House.

Out of these and other meetings has grown a close, intimate relationship existing within the Supreme Bench as a result of the exchange of views and ideas. Now, we are attempting to broaden the base out of which the whole jury list is made in order to bring in many persons who have not heretofore served. We see no reason why some persons should be called back every two years to serve while others are never called. That is a task which cannot be done in one day. We are working on it and a special committee of Judges is moving toward an increase in the basic lists not only as to any group but as to all citizens of Baltimore who are competent and able to serve, whether it be on a petit or Grand Juries. We have sent to Annapolis our approval to a bill to eliminate the exemption of honorary members of the militia from jury service. We have asked the General Assembly to pass a bill authorizing the Board of Estimates of Baltimore City to increase the pay of jurors. We do not believe $3 a day is adequate but we believe that the Board of Estimates, which has to find the money to pay them, ought to be the group which has to pass on what the amount of their pay should be. We are endeavoring to secure a large and representative list of all persons, white and colored, to serve on our Grand Juries and on our Petit Juries, and all this is being done without regard to this particular case.

The Grand Jury of May, 1946, which indicted Zimmerman, was fairly and properly chosen in accordance with the law. No discrimination against Negroes in the naming of that Grand Jury, nor has there been any discrimination of any kind since I have been on the Bench. The evidence in the case dates from Judge Smith's first Grand Jury as Chief Judge, that is, since 1945. There has been no discrimination of any kind since that date. I am not dealing here with any charge that anybody may make as to Grand Juries selected prior to that time.

The evidence here shows no discrimination. The facts are clear, and, I think, demonstrate not that there was

POOR COPY

BLEED THROUGH

no Grand Jury in a long time that had more than one Negro, but on the contrary that in the past two years and a few months there have been three Grand Juries where two Negroes actually were named. The Supreme Bench is not responsible for the fact that the very Grand Jury that indicted Zimmerman had two persons named who were colored but who for personal reasons requested that they be excused from serving.

I have decided, as I have said, to give this oral statement now, based on my notes rather than to wait to write a formal opinion.

The motion to quash the indictment is overruled.

* * * * * *

RULING APPEALED FROM.

(Tr. pp. 1, 189):

Mar. 27, 1947—Motion to Quash Indictment Overruled. Sherbow, J.

DIRECT EXAMINATION OF

EDWARD R. FOLGER, Jury Clerk of the

Supreme Bench of Baltimore City.

* * * * * *

(Tr. pp. 20-21):

(Mr. Boyd) I asked for him to bring his records for that Grand Jury.

(The Court) That is May, 1946.

Q. Have you brought your records for the Grand Jury of that term? A. Yes.

Q. You received prior to the beginning of the May term a list from the Chief Judge consisting of fifty names? A. Yes.

Q. Do I also understand that you, as Jury clerk, select a list of some seven hundred and fifty names from time to time for use in the selection of Juries? A. Petit Juries. In the beginning of each term, it is fifty names that have been nominated for the Grand Jury which makes a total of seven hundred and fifty names.

Q. You select only seven hundred names? A. Yes.

Q. And then the fifty names supplied you are, by you, added to the previous seven hundred and fifty? A. To the seven hundred names, making seven hundred and fifty.

* * * * * *

(Tr. p. 22):

Q. Are the names, the fifty list that Judge Smith sends you, taken out of the service files? A. They are not taken out of the service files. The names are written up, we make a notation on a card and put it in our files.

* * * * * *

(Tr. p. 26):

Q. Had you presented your Jury book to the Jury Judge or the Supreme Bench Judges who got that list of fifty names? A. Yes, they get a copy of it.

Q. Had you done it before you got the list of fifty names? A. No, the Chief Judge presents me with a list that gives me the work to interrogate the prospective Jurors who they nominate.

* * * * * *

(Tr. pp. 32-33):

Q. How many substitutions had to be made to the original twenty-three name list for the May Grand Jury, 1946? A. Three of them.

POOR COPY

BLEED THROUGH

Q. Were those substitutions made from the typewritten list given you by Judge Smith or from some other list? A. That was from the original list.

Q. In connection with other term Grand Juries, when there must be substitutions, or vacancies filled, where do those names come, from the list supplied by the Chief Judge or from the list you had assembled? A. From the list supplied by the Chief Judge.

Q. That is the invariable custom? A. Yes.

Q. So Grand Juries are composed only of names appearing on the fifty name list supplied you each term by the Chief Judge? A. Yes.

* * * * * *

(Tr. p. 39):

Q. Perhaps you know anyhow. Isn't it a fact that there is but one member of the colored race on any Grand Jury? A. At one time we had two. That was the year before last.

* * * * * *

(Tr. pp. 39-40):

Q. Do you know of any other time? A. No.

Q. Do you know of any other time in the history of the selection of the Grand Jury of Baltimore City when there has been more than one member of the colored race? A. One.

Q. One other time besides— A. No, I say only one time.

Q. Would it be correct to say that every year, since there are three terms of Court, there were sixty-nine members of the Grand Jury, of which sixty-six are of the white race, and three, with the one exception you have mentioned, are of the colored race? A. That is right.

Q. That goes back as far as your records? A. Since 1910. That was when the Jury system was put in by Judge Stockbridge.

Q. The number of names, colored names, appearing on the Grand Jury list is not always six, is it? A. More or less, yes.

Q. It does not stay fixed at six? A. No, sometimes it will be four, sometimes six, possibly eight.

Q. But no matter how many names are on the list, with the one exception, there has not been more than one a member of the Grand Jury? A. That is right.

* * * * * *

(Tr. pp. 43-44):

Q. When you investigate a list of prospective Grand Jurors, do you then ascertain that they are or are not of the colored race? Do you actually find out if they are or are not? A. I can tell by the residence, where they live, as a rule. A lot of these names are checked in our files. We have a large file. If we can't find it there, we check the Criminal Court and the Supervisors of Elections and find out his color.

Q. Do you ever go to where he lives? A. I don't, because I know pretty nearly every street in Baltimore City so far as colored section is concerned.

Q. If you had a man who lived at 1700 Madison Avenue in Baltimore city, would that lead you to believe he was colored? A. He lived in a colored section.

Q. I might agree, but would you then conclude that he was colored? A. Because we take the nominations, and the name which has been submitted is marked "C" and we know then he is colored.

Q. It is marked "C" when it is submitted to you? A. Yes, you will find that on that list (indicating).

* * * * * *

POOR COPY

BLEED THROUGH

DIRECT EXAMINATION OF CHIEF JUDGE W. CONWELL SMITH.

(Tr. pp. 47-58):

By Mr. Boyd:

Q. Judge Smith, I don't believe that the stenographer needs to have a formal introduction, but I want to thank you for making yourself available in answer to my letter. My motion, as you probably know, if you haven't read it, has particularly to do with the selection of the Grand Jury of Baltimore City. That is a matter which takes place beyond an iron curtain so far as counsel are concerned. I am wondering if you will be kind enough to tell us for the record just how the Grand Juries for Baltimore City are selected ultimately and particularly with reference to the selection of a member of the negro race. We have reference to the May term, 1946, but I don't know that the method differs in any term from another. A. The method of selecting a Grand Jury has been the same ever since I have been a member of the Bench. I came on the Bench in 1938. A list of persons eligible for service on Grand or Petit Juries is prepared in the office of the Jury Clerk, starting with the list of persons assessed for taxes and augmented by names of persons taken from registered holders of telephones, owners of automobiles, and registered voters. The list is augmented and each term, in advance of the term, a list of seven hundred and fifty names is drawn from the wheel, under the superintendence of a member of the Bench who is designated for that year as the Jury Judge. That list of names is prepared and certified and each term it is augmented by suggestions by the various Judges, who recommend certain other persons who may or may not be already included in the list from their own personal knowledge as qualified to serve on the Jury. Those suggestions are made by the various Judges to the Chief Judge. By him in turn, referred to the Jury Clerk. The Clerk makes a report on them and those

names are added to the list and in advance of the term, the Judges meet, and from that list as augmented by the suggestions from the various Judges, the Grand Jury is selected. Now with particular reference to the colored men serving on the Jury, the list of names drawn under the supervision of the Jury Judge invariably includes a number of colored men, I would say at least one hundred or more. The suggestions made by the various Judges from their own personal acquaintances includes additional colored men. The Grand Jury is drawn by the unanimous action of all the Judges on the Bench and has been so drawn ever since I have been a member of the Bench. And ever since I have been a member of the Bench, the Grand Jury has always included colored men, one or two. I remember Grand Juries on which there have been two colored men. I don't remember any on which there has been no colored men. Does that answer your question?

Q. Well, sir, it serves me with a beginning if I may ask a few further questions. With reference to what you said a minute ago about Grand Juries including one or two, Mr. Folger, I think it is fair to you to say, testified that his records showed only one instance, not giving the year, when the Grand Jury had more than one member of the colored race, and at that time it was two members of the colored race. All other times since 1910, he told us, there has been only one member of the colored race. A. I am sorry my memory does not go back as far as 1910.

Q. His does not either. He was speaking from records. I did not want to be in the position of appearing to contradict you. I wanted you to get the benefit of Mr. Folger's testimony. Is it a fact that members of the Grand Jury are selected only from a special list of names, supplied the Jury Clerk through you? A. It positively is not.

POOR COPY

BLEED THROUGH

Q. Are we to understand that the Grand Jury is made up by selections from a list supplied the Clerk by you plus names on the large list drawn from the wheel? A. You have the cart before the horse. They are selected from a list of names drawn from the wheel augmented by a list of suggestions made by the various Judges.

Q. Do I understand it to be your position that the Grand Jury does consist of names coming from the let's say the larger list in addition to names which appear only on the special Grand Jury list? A. It is not a question of it's being my position. I am stating what is the fact.

Q. May I correct my question? Do I understand that to be the fact? A. That is the fact. It is the first time in my experience that anyone has had the temerity to suggest that there is any discrimination of colored men in the selection of the Grand Jury.

Q. I assume if you are familiar with the opinion of the Circuit Court of Appeals, Judge Chesnut, in the case of the United States Ex Rel. Jackson against Brady—it was in that opinion that I found the suggestion that while there could be no finding that there was any discrimination as to Petit Juries, the Court very clearly indicated that there was a possibility of discrimination as to Grand Juries. And since I have been appointed by a Judge of this Court to defend a man whose life is in jeopardy by reason of the crime with which he is charged, I feel it not only my duty but otherwise authorized to raise every possible point in his defense and I feel that no Judge of the Supreme Bench would in any way be personally affronted thereby, but that their sense of justice and fairness would require that anything of that nature be aired to the fullest extent.

(The Court) You may proceed, Mr. Boyd.

Q. Could you tell us, please, whether or not any reason exists known to you, or any practice exists known to you, where the Grand Jury for the City of Baltimore

with one exception, out of a period of nine years to your knowledge, would have one member of the colored race and only one member of it? A. I don't know of any reason except to say that the members of the Grand Jury are chosen with regard to their qualifications. And I regard it as a pure coincidence that the number of colored men on the Jury has most usually been restricted to one member. It is certainly not the result of any deliberate plan to limit the number to one or two, or any other number.

Q. Would you care, would it be permissible for me to ask you to tell the Judge probably what he already knows but to get it into the record, the method by which the nominations or the preparation of a list for Grand Jury members takes place? A. Well, I can't answer that question without a certain amount of repetition. First, a number of Jurors are selected from the eligible list by the Jury Judge in the office of the Jury Clerk. The names are placed in the wheel and from the wheel are drawn the regular number, usually seven hundred and fifty. That list is added to by suggestions made to the Chief Judge by the various Judges of persons known to them to be eligible to serve on Grand or Petit Juries. Every Judge may make suggestions of anywhere from two to fifteen names. The combination of all those suggested names is referred to the Jury Clerk. He investigates them, reports their age, occupation, home address, whether they have served on Juries before, if so where, and other like information. After the information is supplied, the names are added to the list and drawn from the wheel. From that combined list so augmented, the Judges at a meeting prior to the beginning of each term select Grand Juries. We do not designate the colored men on the list by any distinguishing mark any more, and I could not say, because I have never stopped to inquire, how many colored men are embraced in the list, but I am sure it is a substantial number.

POOR COPY

BLEED THROUGH

(The Court) On the list as typewritten in Mr. Folger's office and sent out, "C" appears after certain names. The final list of twenty-three, does that have any "C" on it?

(The Witness) I don't think so.

(The Court) I know the answer. When the final twenty-three are published, there is no designation indicating that the person is of the negro race.

(The Witness) I don't believe so, no.

(Mr. Boyd) I believe there used to be a custom to that effect.

(The Court) For several years there has been no designation of negro or the letter "C" after Petit or Grand Juries in any Court in this Court House at all. If you were picking a Petit Jury, you would have only the list of the names of the people and if you wanted to find out anything more than their address and occupation, you would have to resort to your own methods of obtaining that information. There is nothing to indicate that the person is white or colored.

Q. That is true. I understand though that the list, part of the list with respect to the May, 1946 Grand Jury, did contain a designation of six colored names thereon, indicating they were colored. A. You mean the list suggested by the Judges?

Q. Yes. At the time of the selection of the Grand Jury, may I ask, is it the practice of the Supreme Bench to take the complete list supplied or submitted to the Supreme Bench by the Jury Clerk which for instance in the May term—I have the original—was it in that form? Do I understand that the Supreme Bench in selecting the Grand Jury took that complete list and perused it and from that complete list selected the May, 1946 Grand Jury? A. Mr. Boyd, it is hardly possible for me to answer about perusing it. Every Judge does

his own perusing. But the list, similar to this list which I have in my hand (indicating) was in the room on the table at the meeting and it was from that list that the selections were made.

(The Court) Let me help you. I think Judge Smith knows the answer. So do I. I know you only want the record to show. Let's go back. Seven hundred and fifty names were taken from a very large list in Mr. Folger's office.

(The Witness) That is right.

(The Court) Judge Smith, do you have any idea how many names Mr. Folger has on list in the Jury Clerk's office?

(The Witness) How many thousands? I have no idea.

(The Court) It goes up into a great big number?

(The Witness) It does.

(Mr. Boyd) It has been suggested in an earlier proceeding that it is twenty thousand.

(The Court) The seven hundred and fifty are selected. They are typed into a black book called the Supreme Bench of Baltimore City Jury book. I am holding it up (indicating). Is that it, Judge Smith?

(The Witness) That is right.

(The Court) To that list of seven hundred and fifty are added names submitted by various Judges?

(The Witness) That is right.

(The Court) Then those names are typewritten up with certain information and what happens to that list with respect to its place physically in the Supreme Bench room?

(The Witness) It is in the meeting on the table before the Judges and from that list the selections for the Grand Jury are made.

POOR COPY

BLEED THROUGH

(The Court) Prior thereto, the Judges sign and certify the list?

A. That is right.

(The Court) When they do, the list is there before them?

(The Witness) That is right. After that the list is placed in the hands of the Clerk of the Superior Court.

(The Court) When we are through. At the time of the selection the seven hundred and fifty list, plus the added names, are on the table before the Judges?

(The Witness) That is right.

(The Court) Speaking only from your own observation, is it or not a fact that some Judges do look through that list?

(The Witness) Yes, some of them do. It is true also that some of them refer to their own files in making selections for the Grand Jury.

(The Court) Each Judge acts for himself with respect to what extent he goes through that list?

(The Witness) That is right, but the selection is made by all the Judges together.

• • • • • •

(Tr. pp. 64-65):

(The Court) Judge Smith, may I refresh your recollection and ask you if it is not a fact that there was a vacancy of one individual and that I asked you, or rather that you and I attempted to reach a colored person just recently?

(The Witness) Yes, I remember such an instance but we were unable to reach him as I recall it.

(The Court) Mr. Boyd, I am sure you will accept my statement that that is so. There was more than one vacancy. As we went down the list, there was one name

that I wanted to reach. We could not even get the person by telephone. Judge Smith tried while we were in the Bench room to get him at one place. When he could not, I tried at another. We gave it up because we had to organize the Grand Jury the next day. That was recently.

(Mr. Boyd) That was subsequent to the May term, 1946?

(The Court) This incident was.

• • • • • •

(Tr. pp. 69-72):

Q. Judge Smith, I hope you won't misunderstand this question but I have been under the impression, rightly or wrongly, that the recommendations most seriously considered or ultimately resulting in the selection of the colored member of the Grand Jury comes from that member of the Bench or the senior member of the Bench who, before his ascendency was a member of the Republican Party, is that true or not? A. No, that is not true. He might think so.

Q. Since it is by the unanimous action, if he voted so, he would have the power of veto the same as any other Judge, but is it not a fact that the member of the Grand Jury of the colored race has originated from the nominations of the Republican member of the Supreme Bench? A. Sometimes it has.

Q. That is not a regular course of events? A. There is no practice in that regard, no.

Q. Judge Smith, do I understand that you—I don't mean this in any way but with the utmost respect—your explanation of the fact that since 1938 there have been but three members of the Grand Jury, with one exception, in any year, each of the three Grand Juries in any one year having but one member of the colored race is pure coincidence? A. That is right.

POOR COPY

BLEED THROUGH

Q. Judge Smith, to make sure again that I understand correctly, if you will permit me, do I understand that the Grand Jury as ultimately selected, is selected by the Judges by a consideration of and selection from the list, augmented list I think you called it, and also the list selected from the wheel by the Jury Judge? A. It is selected from the augmented list as I have described it. The selection is made with regard to the qualifications of the members of the Grand Jury as citizens and wholly without regard to their race or color.

Q. But perhaps I did not make myself clear. Do you know of any instance where the Grand Jury was selected from anything but the list which you supplied to the Jury Judge, that being the compilation of the recommendations of yourself and the other Judges of the Supreme Bench? A. I positively do. The list is selected —The Grand Jury is selected from the combined list and is not restricted to the list of suggested names received from the Judges.

Q. In that respect I would like to call your attention to the copy of the May term, 1946, document, entitled "Wheel-drawing, Jury Judge W. Conwell Smith" and ask you to look at the fourth page thereof which is designated Grand Jury nominations, May term, 1946. But passing over two pages to look at the next page designated corrected list of nominations for the Grand Jury, May term, 1946. Then pass over again to a subsequent page with number eight for designation "Seven hundred and fifty names for the May drawing, 1946." And I ask you if you would comment on that with respect to my last question? A. It speaks for itself.

Q. The Grand Jury was selected not only from the Grand Jury nominations and corrected list of Grand Jury nominations but also from the names following page eight to which I just referred? A. That is right. You may find in that instance that all of the Jurors eventually selected came from the Judges' nominations or

partly from the Judges' nominations and partly from the general list drawn from the wheel, but my statement still stands that they are selected from the combined list.

• • • • • •

(Tr. pp. 86-87):

RE-DIRECT EXAMINATION OF
EDWARD R. FOLGER, JURY CLERK.

By Mr. Boyd:

Q. How many colored names do you select for the seven hundred and fifty list? A. We generally put in fifty.

Q. When did you start putting in fifty? A. It has been about four years ago. We used to put in twenty-five.

Q. What was the occasion for the change? A. At that time Judge Sayler was the Jury Judge. He thought fifty would be proper.

Q. How do you place those fifty colored names on that list? A. They are put in on the carbon copy of the ballot we use. We used to use "C" on it. Our office received an order from the Bench to eliminate "C".

Q. Then how do you know you are putting twenty-five or fifty colored names on the list? A. For my own individual use, I use a buff card——

Q. Brown? A. For colored.

Q. That indicates he is colored? A. Yes.

Q. For white men you use white cards? A. Yes.

• • • • • •

(Tr. pp. 88-89):

Q. You think that the change from twenty-five to fifty took place about four years ago? A. About.

Q. Was it following the time you testified in the United States District Court? A. It was after I testified.

POOR COPY

BLEED THROUGH

Q. Then you upped it to fifty? A. Yes.

• • • • • •

(Tr. p. 90):

Q. You don't put into the Jury wheel the Grand Jury cards? A. No.

Q. Nor do you put into the Jury wheel the cards of the Grand Jury list that are left over after the Grand Jury is selected? A. No.

• • • • • •

(Tr. pp. 103-105):

DIRECT EXAMINATION OF
LAWRENCE R. MOONEY, DEPUTY CLERK
TO THE SUPREME BENCH.

(The Court) No, let's confine it to the selection of the May term Grand Jury, 1946, and then you may enlarge if you want to as to any other term. Take it step by step directed to one. Since it must be one, let it be the one involved in this case.

Q. If you can tell us what you did with respect to the May term Grand and Petit Juries selections as part of your duty please do so. A. Mr. Folger, the Jury Clerk, turns over to me a list of seven hundred and fifty names. In addition to that, he also hands me another list which is—at the top of which is the expression Grand Jury nominations, May term, 1946. Upon receipt of those papers, or those names, I put them in the current Jury Book and afterwards type up what is known as a certification which is signed by the Judges at a future time. That certification indicates that those names were qualified to serve as Grand and Petit Jurors. When the Bench meets, I take the current Jury book along with the certification of the names to the consultation room where the Judges confer.

Q. Does the certification come before you take the book into that room or afterwards? A. I draw it up but

it is not signed. It stays in the consultation room until at a subsequent time the secretary to the Bench sends for me and turns over to me the list of the names. The heading on that list is "Corrected list of nominees for the Grand Jury".

* * * * * *

(Tr. pp. 108-112):

Q. Then during that session or conference of the Supreme Bench, and sometimes during the time it is going on, you are called by the secretary to the Supreme Bench? A. That is right.

Q. That is one of the Judges? A. Yes.

(The Court) Who is it?

(The Witness) Judge Edwin T. Dickerson.

Q. How does that take place, in what form? Does he call you to the door, or do you go in the room? A. He calls me to the door. From the outside he hands me a number of papers. He asks me to draw up the order of the Grand Jury for that particular term.

Q. Do you happen to have with you the sheets of paper which he handed to you in connection with the May term, 1946, Grand Jury? A. I do not have it.

Q. Do you have a copy of it? A. No.

Q. Why is that? A. The list that he hands me is marked in pencil indicating the numbers one to twenty-three. I type those on an order and return the order along with what he had given me, sheets of paper with penciled numbers on them.

Q. Have you any copy at all of the list he handed you on which the numbers have been marked? A. Not in my possession, no.

Q. Do you know what happens to that list from which you take the twenty-three names? A. I do not.

POOR COPY

BLEED THROUGH

(The Court) I hate this air of mystery about what is such a simple matter. Judge Dickerson and Chief Judge Smith take the numbers out of a list of fifty or sixty names, together with a list of seven hundred and fifty?

(The Witness) Yes, sir.

(Mr. Boyd) That is not what has been testified to.

Q. Does the secretary give you the list of seven hundred and fifty when he gives you the list with the names of the Grand Jury marked on it? A. No.

(The Court) You get a list containing how many names?

(The Witness) fifty, it could be more or less, sometimes as many as sixty.

(The Court) Out of that list certain numbers are marked. You type them in the order in which they are marked, bring it back to the Supreme Bench room, twenty-three persons having been marked, you type that up?

(Witness) Yes.

(The Court) Is that a list of around fifty names?

(Witness) Yes.

(The Court) Where is the list of seven hundred and fifty names?

(The Witness) In the consultation room.

Q. That list is not handed to you at any time prior to your returning the typed list of twenty-three names to the Supreme Bench? A. That is right.

Q. The typed list you make up is on what form? A. I have it here (indicating) Some is printed. The names I type.

Q. Do you have it for the May, 1946, Jury? A. Yes, here it is (indicating).

Q. You have handed me two papers (indicating). One is dated April 29, 1946, and is printed, partly typed, and partly signed apparently by a large majority of the Judges, ten of the Judges. That is the list which you prepare from the instructions given you by the secretary? A. Yes.

Q. You take this list back in triplicate form? A. I take it back, just the original.

Q. It is then signed? A. Yes.

Q. This paper I hold (indicating) in typing and ink, dated May 8th, 1946, apparently is a correction or substitution of certain names? A. That is right.

Q. From the combined two lists, what do you do? Rather, from the first list what do you do with the first list that is signed? A. I make a copy and send it to the Sheriff's office to have the names summonsed on the date indicated.

• • • • • •

(Tr. pp. 113-114):

Q. What happens to the seven hundred and fifty list? When do you again come into contact with that? A. After the Bench, the session of the Bench is over, I go into the consultation room and get it.

Q. Do you find that it has been signed by the Judges? A. It is signed before the Judges go into formal session on the Bench. They sign that a few minutes before ten o'clock.

Q. How far back do you have records of the Grand and Petit Juries for Baltimore City in your possession as part of your duties? A. The original Grand Jury orders, I can go back a considerable length of time, thirty years possibly. But the records I keep here of the seven

POOR COPY

BLEED THROUGH

hundred and fifty names, plus the additional list I have back to 1940.

• • • • • •

(Tr. pp. 114-119):

Q. Have you had occasion to compare the names appearing on the May term, 1946, Grand Jury list, with the list of the nominations for the May term Grand Jury list, or perhaps I should call it the fifty name list? A. I have.

Q. Will you tell us whether or not there are any names on the Grand Jury as selected which did not appear on the fifty name nominations list? A. There were none.

Q. I believe it is a fact that, let's put it this way—strike that out. Were there any names on the finally selected Grand Jury list which also appeared on the seven hundred and fifty list? A. There was one.

Q. Have you also had occasion to check the names appearing on the finally—on the originally selected or finally selected Grand Jury list for years, other than 1946 and including other Juries in 1946? A. I have.

Q. How far back were you able to check that, to 1940? A. Yes.

Q. Will you tell us whether there were on any of the Juries that you were thus able to check, whether there was any occasion when the names on the ultimately selected Grand Jury list or the original list before correction, the Grand Jury list, did not appear on the fifty name nominations list? A. No, in each and every case they did appear.

Q. Was there any other instance but the one to which you refer in the May term, 1946, when a name on the originally or ultimately selected Grand Jury list appeared other than on the nominations fifty name list? A. Yes, there were several other occasions.

Q. They appeared then on both lists? A. Both lists.

Q. But there was no occasion when a name selected for the Grand Jury did not appear on the Grand Jury nominations list? A. That is right.

(Mr. Boyd) I would like to offer in evidence the original record the Grand Jury, May term, the original and corrected selection lists.

(Thereupon the papers referred to were offered in evidence and marked Defendant's Exhibit A 2-24-47 and Defendant's Exhibit B 2-24-47).

Q. How many occasions were there when a name would appear on both the nominations list and the seven hundred and fifty list in the period you examined it? A. Four.

Q. Including the first one you referred to? A. That is right.

Q. Was there ever any occasion when that occurred more than once with respect to any particular Jury? A. Yes, on one occasion twice.

Q. There have been three places when names appeared both on the nominations and the seven hundred and fifty list? A. I should say four.

Q. You said there were two names on one Jury— A. Well, five names if you take it under those circumstances. In the May term, 1940, two names appeared on both lists.

Q. Three other Juries had one name? A. Yes.

Q. Including the May, 1946? A. Yes.

Q. Have you produced the May term nominations list as it was filed in your record? A. I have it here, yes (indicating).

Q. May I see that?

(Thereupon the witness handed it to Mr. Boyd).

POOR COPY

BLEED THROUGH

Q. Is this (indicating) original typing? A. As far as I know it is.

Q. How did that get into your possession? A. Mr. Folger turned it over to me.

Q. At what time? A. Prior to the date the Judges signed the certification.

Q. Do you have any Grand Jury nominations list which appears in your 1946 Jury Book? Does this appear anywhere as part of your permanent record? A. That is my permanent record here (indicating).

Q. You keep it in this looseleaf fashion? A. Yes, and eventually bind them and put them in these folders (indicating) for the year.

(The Court) How many are listed for the 1946 list?

(Mr. Boyd) How many names?

(The Court) Yes, they are numbered, aren't they?

(Mr. Boyd) No, this is the clipped copy.

(Mr. Boyd counting). There are fifty names on the list in original typing. This page is headed Grand Jury nominations, May term, 1946. This Grand Jury nominations list I think we had better have marked.

(Thereupon the paper referred to was marked Defendant's Exhibit D 2-24-47).

* * * * * *

(Tr. p. 120):

(Mr. Boyd) For the record, I think we had better mark the seven hundred and fifty list. That list being termed seven hundred and fifty names for the May drawing, 1946. And this list concluding with a certificate to the effect that the Judges of the Supreme Bench certify they have selected the aforegoing seven hundred and fifty names of persons qualified to be Grand and Petit Jurors for Baltimore City, signed by seven Judges.

* * * * * *

(Tr. pp. 130-138):

DIRECT EXAMINATION OF
HONORABLE SAMUEL K. DENNIS.

By Mr. Boyd:

(Mr. Murrell) Your Honor, before Judge Dennis testifies, I want to enter a definite objection to any testimony by Judge Dennis except pertaining to the May, 1946, Grand Jury, and the selection thereof.

(The Court) Mr. Boyd, what is the testimony you want to produce from Judge Dennis.

(Mr. Boyd) The traditional and almost from time immemorial custom engaged in by the Supreme Bench of Baltimore City in the selection of Grand Juries, particularly with reference to the colored members thereof.

(The Court) I will let you go up to the point where your first question deals with the issue and then I will rule. Proceed.

Q. Judge Dennis, you are a former member of the Supreme Bench of Baltimore City? A. I was the Chief Judge of the Supreme Bench for slightly more than sixteen years. I went on in August, 1928 and I resigned effective the latter part of August, 1944.

Q. During that time, did you have occasion to study and consider the method of the selection of the Grand Juries for Baltimore City? A. Unquestionably.

Q. During that time you also served on occasion as the Jury Judge, I believe? A. I would say some, I think three years. I will not be sure.

Q. Judge Dennis, I am particularly interested in obtaining for the Court and the record your testimony generally with respect to the selection of the Grand Jury, but particularly with respect to the question of the members of the Grand Jury of the members of the colored race, and I ask that you tell the Court what that

POOR COPY

BLEED THROUGH

custom, practice, system, whatever it might be called, was when you came on the Bench and whether or not during your tenure on the Bench there was any change in that system.

(Mr. Murrell) Objected to, except as to the selection of the May, 1946, Grand Jury.

(The Court) Sustained. In explanation of the Court's sustaining the objection, I again call your attention to the fact that whatever may have been the practice prior to 1946, if that same system obtained in the May, 1946, selection, then of course, you could show a tradition and custom. But if that practice has changed after 1944, 1945, and in 1946 was not the custom that had existed prior thereto, then the testimony of Judge Dennis and the other members of the Bench who have retired, would have no application to this particular case.

(Mr. Boyd) If I can paraphrase the word of Pope, I think it was in the Antiquities but it might be in the Rape of the Lock, he said "It is not fish you are buying but men's lives". I say it is not fish but men's lives. You have in this City under the testimony already in this case, the testimony of the Jury Clerk in whose possession records——

(The Court) Mr. Boyd, if you want to argue the merits of the case I shall be only too glad to hear from you at the conclusion of the testimony in this case.

(Mr. Boyd) You don't care to hear from me at this point?

(The Court) No.

(Mr. Boyd) Under the rules of the Supreme Bench, I shall not attempt to argue it any further.

(The Court) Is there anything else?

(Mr. Boyd) Yes, sir, I shall ask specific questions, unless you direct me not to.

(The Court) Proceed.

Q. Judge Dennis, while you were a member of the Supreme Bench and up until the time you resigned as its Chief Judge, was there a practice or a custom with respect to the number and selection of colored members of the Grand Jury?

(Mr. Murrell) Object to.

(The Court) Sustained.

(Mr. Boyd) The Judge may not even answer yes or no?

(The Court) He may not. You are talking about 1944.

(Mr. Boyd) From 1910 to 1944 under the evidence already in this case.

(The Court) Sustained.

Q. Judge Dennis, is it not a fact that during the time you were on the Supreme Bench and as its Chief Judge, there was the established practice to limit members of the colored race to one member out of twenty-three members of the Grand Jury?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Judge Dennis, is it not a fact that during the time you were on the Bench it was the established practice and custom that the negro member of the Grand Jury was selected and determined by the Supreme Bench based on a nomination or suggestion made almost invariably if not invariably by the or a Republican—by a member of the Supreme Bench who was a Republican before his ascendency to the Supreme Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Judge Dennis, assuming for the purpose of this question that there did exist while you were on the

POOR COPY

BLEED THROUGH

Bench and during the whole time you were on the Bench, the practice of limiting the colored race's proportion on the Grand Jury to one member, did you ever suggest or move the Supreme Bench to increase that number or change that number in any way?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I have no further questions.

(The Court) Thank you, Judge Dennis.

(Mr. Murrell) Thank you very much.

(Testimony of witness concluded.)

(Mr. Boyd) Your Honor, I tender to prove, based on the questions that I have already propounded and which have been denied, that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted, and deliberate practice of the Supreme Bench accepting as its final selection as the colored member of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. I also offer to prove substantially those exact facts by former Judge Eugene O'Dunne, serving from 1926 until 1945, and by former Judge Eli Frank, who served from 1922 until 1943. I further offer to prove——

(Judge Frank) Until 1944.

(Mr. Boyd) Excuse me, until 1944. I further offer to prove by Judge Frank that on occasions he suggested that there by a change in the method of selecting the colored members of the Grand Jury, particularly as to

the number, and that that suggestion did not meet any favorable response on the part of the other members of the Bench. I also offer to prove substantially the same facts by Judge Duke Bond, who was a member of the Supreme Bench—I don't remember when you were on.

(Judge Bond) 1922 to 1938.

(Mr. Boyd) 1922 to 1938. I further offer to prove by Judge O'Dunne that on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice.

(Mr. Murrell) Is that your total tender?

(Mr. Boyd) For the time being.

(Mr. Murrell) I object to the tender of testimony on behalf of Judge O'Dunne, Judge Bond and Judge Frank as submitted by Mr. Boyd. I am willing to agree to let them testify if they are qualified as to the selection of the Grand Jury of May, 1946.

(The Court) The tender will not be accepted, Mr. Boyd. The motion, I assume it is a motion, or the objection is sustained, rather.

(Mr. Boyd) There was no objection to my tender with respect to Judge Dennis.

(Mr. Murrell) Judge Dennis took the stand.

(The Court) Does your motion include Judge Dennis?

(Mr. Murrell) Yes, sir.

(The Court) The same ruling. I might say in passing since the Judges are here, that if the testimony showed that a practice which they apparently objected to is no longer in existence it would prove gratifying to them if

POOR COPY

BLEED THROUGH

the evidence established that fact. Do you want to call another Judge? I thought you made arrangements to have Judge Sayler here?

* * * * * *

(Tr. pp. 139-143):

DIRECT EXAMINATION OF

JUDGE J. ABNER SAYLER.

By Mr. Boyd:

(The Witness) My name is J. Abner Sayler. I am an associate Judge of the Supreme Bench of Baltimore.

(The Court) From when?

(The Witness) 1937, the month of June. June eighth, I was just told.

Q. Judge Sayler, are you familiar with the selection of Grand Juries by the Supreme Bench of Baltimore City? A. Yes. I have been since 1937.

Q. Judge Sayler, at one time you were the Jury Judge, I believe? A. I have been Jury Judge two years that I can recall.

Q. Judge Sayler, my inquiries are directed to the manner of selection of the Grand Juries, particularly with reference to the participation therein of members of the colored race. I would like to ask you whether or not since you became a member of the Supreme Bench there has been any change in the method of the selection of the Grand Jury or the colored member thereof?

(Mr. Murrell) Objected to.

(The Court) Sustained. Direct attention to the May, 1946, Grand Jury and its manner of selection.

Q. Do you recall the manner of the selection of the May, 1946, Grand Jury? A. I remember it generally, but I don't remember individual members on that Grand Jury.

Q. Judge Sayler, do you know whether or not the May, 1946, Grand Jury was selected in any manner differing in any way from Grand Juries selected prior to that time? A. Frankly, Grand Juries since I have been here, have been selected in one manner and I know of nothing unusual about the selection of that Grand Jury.

Q. Over previous Grand Juries that were selected? A. I know of nothing unusual about it.

(Mr. Boyd) Thank you, that is all.

(The Court) Judge Sayler, throughout this entire hearing a question has been asked and I am asking you specifically now that question to get the answer. Have you taken unto yourself the naming of the colored members of the Grand Juries since May, 1946, to the exclusion of the other members of the Bench in their selections?

(The Witness) No.

(The Court) Judge Sayler, do you know how many colored persons were selected in the May, 1946, Grand Jury?

(The Witness) I have no independent recollection.

(The Court) Are there any other questions, Mr. Boyd?

(Mr. Boyd) No.

(The Court) Mr. Murrell?

(Mr. Murrell) No.

(The Court) Thank you very much, Judge Sayler.

(The Witness) Is that all?

(Mr. Murrell) Thank you very much.

(Testimony of witness concluded.)

(Mr. Boyd) I re-offer the testimony of Judge O'Dunne, Judge Dennis, Judge Frank and Judge Bond.

POOR COPY

BLEED THROUGH

(Mr. Murrell) I make the same objection.

(The Court) The same ruling, denied.

(Mr. Murrell) I assume that Mr. Boyd has finished calling witnesses.

(The Court) Do you have any other testimony, Mr. Boyd?

(Mr. Boyd) I want to get some figures into the record.

• • • • • •

(Tr. pp. 143-146):

(Mr. Boyd) I would like to get into the record either by asking the Clerk to appear or suggesting to the Court the figures which I obtained from the Board of Election Supervisors, that in Baltimore City, being unable to break the figures down as between male and female, but as between white and colored voters, there are two hundred ninety-four thousand two hundred sixty nine white registered voters, and that there are forty-nine thousand three hundred and eighty two colored.

(The Court) Give me them again.

(Mr. Boyd) Two hundred ninety-four thousand, two hundred sixty nine male and female white voters.

(The Court) Of what year are you speaking?

(Mr. Boyd) The close of 1946. And that there are forty-nine thousand, three hundred and eighty two colored voters, male and female.

(The Court) Is there any breakdown between male and female?

(Mr. Boyd) They told me that you would get it only by running the totals down in the precincts. I am willing, without taking the time to do it now, to have that incorporated by reference available to either party. I think also that earlier in the proceedings I talked to Mr. Murrell and told him the latest census figures I could get

were estimates of the Health Department of Baltimore City. They showed the total population nine hundred thirty-five thousand population in the City, of which 19.3, or four percent—

(The Court) 19.3 or 19.4?

(Mr. Boyd) 19.3 or 19.4 were of the colored race.

(The Court) Did you get it from Dr. Fales?

(Mr. Boyd) Over the telephone, yes, sir. That estimate was as of June, 1946.

(The Court) Isn't it a fact that there has been some influx into Baltimore City of white and colored as a result of the war industries?

(Mr. Boyd) That is true.

(The Court) They cannot, of course, waive the one year declaration of intentions act.

(Mr. Boyd) Yes, sir, bearing that in mind I found out which was the latest official census. I found it was 1940. The proportion in 1940 was either 19.3 or 19.4. They alternate. I don't remember which is which, but it is within one tenth of one percent, age point? I think that ought to be available for use in the record if either side sees fit.

(The Court) I will allow either side to incorporate into the record any official figures, but I do not know of any figure that Dr. Fales has published that would substantiate the figure of nine hundred and thirty-five thousand for Baltimore City. We have made some studies for other purposes, or I have. I am afraid that figure may be misleading. In any event, you find it is 19.4 in 1940. It is 19.3 today.

(Mr. Boyd) Yes, sir.

* * * * * *

POOR COPY

(Tr. pp. 146-147):

DIRECT EXAMINATION OF

JUDGE EMORY H. NILES.

By Mr. Murrell:

(The Court) For the record, your name, date of admission to the Supreme Bench?

(The Witness) Emory H. Niles, associate Judge of the Supreme Bench, elected in 1938.

Q. You were a member of the Supreme Bench in May, 1946? A. I was.

Q. You were an associate Judge in connection with the selection of the May, 1946, Grand Jury, is that right? A. I was.

* * * * * *

(Tr. p. 150):

(The Court) What is the practice of the Supreme Bench in May, 1946, and since with respect to excusing persons from service on the Grand Jury if they find it too burdensome?

(The Witness) My knowledge is based upon my own experience in the Criminal Court prior to the May term, 1946, but I believe the practice is exactly the same, that the person selected himself requests that he be excused for various personal reasons.

* * * * * *

(Tr. pp. 152-153):

(The Court) To what extent have you personally made nominations of members of the negro race for service on the Grand Jury since 1946?

(The Witness) I looked up my records and unfortunately I destroyed a file I had been keeping for a long time about six months ago in order to get rid of what I thought was an unnecessary accumulation of papers. In

1946 I have been able to locate nominations I have made. I find that in April——

(Mr. Boyd) Objected to.

(The Court) The April nominations are for which term of the Grand Jury?

(The Witness) The May term.

(The Court) Overruled, proceed.

(The Witness) I find I nominated Mr. Berry in April. He is a member of the negro race. In June, I made three other nominations. There were no members of the negro race in the June nominations. In December——

(Mr. Boyd) Objected to.

(The Court) This is 1946?

(The Witness) 1946.

(The Court) For the present term Grand Jury?

(The Witness) Yes.

(The Court) Overruled.

(The Witness) I made three nominations. There were no members of the negro race.

(The Court) With reference to the selection of Jurors, for the purposes of the record, will you state what, if anything, you did and what action was taken by the Supreme Bench toward eliminating any designation on the Petit Jury list of persons of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled. And can you give approximately the date?

• • • • • •

(Tr. pp. 154-155):

(The Court) Do you know of any custom since 1946 by which one particular member of the Supreme Bench,

POOR COPY

BLEED THROUGH

who has been called in these proceedings the Republican member, makes the selection of the Grand Jurors who are members of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled.

(The Witness) I know that there is not such a rule or custom on the Bench because I personally both in 1946—am I allowed to speak of before 1946?

(The Court) Let's speak about 1946 for the minute.

(The Witness) In 1946 I have nominated two members of the colored race and would have nominated others if their names had been available to me and I had known them.

• • • • • •

(Tr. pp. 156-160):

CROSS EXAMINATION OF
JUDGE EMORY H. NILES.

By Mr. Boyd:

• • • • • •

Q. Had you personally made nominations for the negro race prior to 1946?

(Mr. Murrell) Objected to.

(The Court) Sustained. Do you care to make a proffer of proof?

(Mr. Boyd) No, that is the time I asked a question and didn't know the answer. That is a dangerous thing.

(The Court) Not if you are looking for facts rather than playing a game. With a man's life at stake, I am sure you are not playing a game.

(Mr. Boyd) True, but consistency is a jewel and it is Your Honor's ruling——

(The Court) I am trying to be consistent.

Q. Has there been any material change in the method of selecting Grand Juries as between 1946 and prior to that time while you were on the Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained. I don't know what you mean by a material change. If you are talking about the way in which the Bench sits down and goes over the list, that is one thing. If you are talking about colored names and names that are submitted and whether there has been any change in the number of negro nominations, I certainly will permit you to ask Judge Niles that question. Do you want to ask whether there has been any change with respect to number that he has had personal knowledge of——

Q. Do you know what the practice of the Supreme Bench was in 1938, when you first came on the Bench, with respect to the selection of Grand Juries particularly with reference to the colored members thereof?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I don't know how I am going to show a change if I am not entitled to show what existed before.

(Mr. Murrell) Maybe there hasn't been any.

Q. Has there been any change or not in the manner of the selection of the Grand Jury particularly with respect to the participation of the colored race thereon since you became a member of the Supreme Bench? I mean a deliberate, acknowledged, and accepted change of policy?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Has there been any change in the practice of selecting Grand Juries particularly with respect to col-

POOR COPY

ored members thereon since you became a member of the Supreme Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I thought that was the question you suggested.

(Mr. Murrell) The suggestion was the number.

(The Court) The May, 1946, Grand Jury, if no one had declined, would have had two members of the negro race on it?

(The Witness) Yes. They were—the original list of twenty-three contained two negroes.

(The Court) You don't have any independent recollection of whether the other two Grand Juries in 1946 may have had more than two or less than two negroes, do you?

(The Witness) I have no recollection.

(The Court) As a matter of fact, did you have any recollection of how many were on this Grand Jury until you looked at the names?

(The Witness) No.

(The Court) Is there anything else, Mr. Boyd?

Q. Do you know how many members of the Grand Jury previous to 1946 came from the colored race?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) It is already in evidence.

(The Court) Judge Niles just got through telling you he has no independent recollection of how many there were.

(Mr. Boyd) I am talking about before 1946.

(The Court) Sustained.

• • • • • •

(Tr. p. 163):

• • • • • •

(Mr. Boyd) • • • I really think it is incumbent on the Bench under the facts as they have developed in this case—I think the burden has shifted. I think if the record is to be clear I think there should be a voluntary statement by the several other members of the Supreme Bench as to what the practice is or is not. • • •

• • • • • •

(Tr. pp. 167-175):

TESTIMONY OF
CHIEF JUDGE W. CONWELL SMITH.

(The Witness) May I stand, Judge?

(The Court) Yes. I understand that Judge Smith has gone over the record in this case and desires to testify further. Is that right, Judge Smith?

(The Witness) I have gone over it and I have also made an inquiry. As a result thereof, I would like to read a statement into the record.

(The Court) You may proceed, Judge Smith.

(Mr. Boyd) May we know what record has been gone over?

(The Court) The transcript in the case. I have had that written up for myself preparatory to writing an opinion in the case assuming the case had been disposed of.

(Mr. Boyd) I didn't know it was written up.

(The Court) There was such an apparent error as to one matter of fact that I showed the record to Judge Smith. You may proceed.

POOR COPY

(The Witness) Your Honor, when I originally appeared to testify in this case, on January 29th, 1947, I came without any particular preparation in the mistaken belief that I should be able to answer any question asked me by relying upon my memory alone. I found a number of questions that I could not answer fully, because I had no memory of the details. I have since had an opportunity to make an inquiry into the relevant facts, as a result of which I am now able to state facts, which are accurate, having been checked and double checked, in addition to the general statement previously made, which I believe to have an important bearing upon the question raised before you in this case. This is my reason for asking leave to appear here a second time.

I first want to ask leave to correct an error in my original statement. I spoke (more than once) of the list of 750 names furnished by the jury clerk prior to the beginning of the term as having been "drawn from the wheel". These names are not drawn from the wheel, but are drawn from the jury service file.

While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced. The belief expressed by all of the counsel in the Jackson case that the Judges of the Supreme Bench were not animated by conscious prejudice against negroes in the selection of juries, may, I believe, as to the members of the present Bench, be demonstrated as a fact from the records.

I am able to speak with greater assurance in regard to the selection of the Grand Juries of the period since I became the Chief Judge on September 1st, 1944. Since that time, all of the suggestions of the various Judges for the make up of the Grand Juries have been channeled through me, and the records of these suggestions are still available to me.

Since my appointment in 1944, the Judges have
more frequently, and have thus had a greater oppo
nity for discussion and the free interchange of opin
In addition to the monthly meetings on the first Sa
day for the hearing of motions for new trial in crim
cases, the Judges meet on Thursday of each week du
the luncheon recess in the Supreme Bench confer
room. During these meetings the selection and comp
tion of the Grand Juries and petit juries and the par
pation of negroes in jury service have been discus
Early in 1945 the Bench ordered the removal of
distinguishing marks after the names of negro mem
of the Grand and petit juries.

During that period, seven Grand Juries (begin
with the January Term, 1945) have been selected
the nominations of the Judges to augment the ger
list, the highest number of negroes was six and the
est number two, out of a total which varied from 4
54. Out of the seven Grand Juries, only one colored
was selected and certified to serve, and did serve
each of four Grand Juries; while on each of three G
Juries two colored members were selected and cert
to serve.

On the January Term, 1945 Grand Jury the follo
negroes served:

Edward Richard Blake, 907 North Carey Street.

W. Emmett Coleman, 2026 Madison Avenue.

On the September Term, 1945 Grand Jury, the
lowing negroes served:

Edward N. Wilson, 754 Dolphin Street.

Robert James Young, 501 Sanford Place.

On the May Term, 1946 Grand Jury the follo
negroes were selected and certified as members:

Willard W. Allen, 1223 West Lafayette Avenue.

POOR COPY

BLEED THROUGH

John L. Berry, 2038 Druid Hill Avenue.

Both of these members of the Grand Jury were unable to serve and asked to be excused from serving. As I have previously stated, it has not been the practice to compel persons to serve on the Grand Jury against their will. Both were excused from serving, and among the persons selected to fill the places of persons unable to serve was a third negro, T. Wallace Lansay, Sr., 1634 Druid Hill Avenue, who accepted, and served.

On seven Grand Juries, therefore, eleven negro members were selected to serve, of which two asked to be excused from serving, and were excused, while nine agreed to serve, and did serve. Since 1944, the Judges of the Supreme Bench have done the following things in regard to jury selection and service:

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended the increase of the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of Judges to study the jury system, and make recommendations looking to:

a. Broadening the representative character of the basic jury list, and

b. Improvement in the method of selecting persons for jury service.

The general scheme for the selection of Grand and Petit Juries in Baltimore was provided by the Acts of 1898, Chapter 123. The pay of jurors is provided by the acts of 1927, Chapter 65. Improvement in jury selections may require changes in the laws regulating jury ser-

vice, or changes merely in the method of administering them. The participation of negroes in jury service is but one phase of the problem. I cannot say that this particular phase of the problem has received special attention from the Bench, but I can say that the whole problem, and its many phases, has been given consideration.

(The Court) Are there any questions you wish to ask Judge Smith, Mr. Murrell?

(Mr. Murrell) No, sir.

(The Court) Mr. Boyd?

By Mr. Boyd:

Q. I believe you appeared originally on the 29th of January, if that is the right date? A. That is what the record shows.

Q. In answer to a written request from me, did you not? A. That is right.

Q. And my request stated that I believed it would be appropriate and necessary to have in the record statements by you and at least one other member of the Supreme Bench, probably Judge Sayler, concerning the mode of selecting the Grand Juries for Baltimore City? A. That is right.

Q. And it referred to the motion in the case of the State versus Zimmerman? A. That is right, Mr. Boyd. And I thought I should be able to answer your questions without making any particular inquiry. The facts which I have related here have been developed as the result of a rather extended inquiry which took a considerable period of time and a great deal of effort.

Q. The only purpose of my question was to have in the record—I am sure you did not mean it—you may have left the impression that I had not attempted to advise you of the nature of the case? A. No, I knew the

POOR COPY

purpose for which I was to be here but I thought I knew the subject better than it turned out I did.

(The Court) Is there anything else further from Judge Smith?

(Mr. Boyd) No, sir. While he is here, I think duty requires me to make a motion that all matters of opinion contained in the statement, which I did not see fit to interrupt as a matter of courtesy, be stricken from the record.

(The Court) The motion is overruled. Is there anything else?

(Mr. Boyd) No, sir.

(The Witness) May I be excused?

(The Court) Certainly.

(Testimony of the witness concluded.)

* * * * * *

POOR COPY

APPENDIX TO APPELLEE'S BRIEF NO. 177

(Tr. p. 21):

(The Court) I am afraid that the use of the word "prepared" may leave a meaning that is not quite right. A list may be prepared but it is the way in which it is selected that, I think, you want to ask him about now.

(Mr. Boyd) I gladly accept that suggestion for I am in a position of asking about something that you know about and I don't. Any time you have a suggestion like that, I would welcome it.

* * * * * *

(Tr. p. 23):

DIRECT EXAMINATION

EDWARD R. FOLGER

Q. Who was the Jury Judge in 1946? A. In 1946 it was Judge Smith.

(Tr. pp. 31-32):

(The Court) Grand Jury nominations, May term, 1946. Then follows two pages. And then a long series of pages. I shall not stop to count them.

(Mr. Boyd) The long series do not refer to the Grand Jury?

(The Court) Yes, they do. That is why I am afraid—I want to be sure you get all the facts.

(Mr. Boyd) I understand. I am sure you will.

(The Court) Then appears this, "The undersigned Judges of the Supreme Bench of Baltimore City hereby certify that they have selected the aforegoing four hundred and forty-three names of persons qualified under the laws of the State of Maryland to be Grand and Petit Jurors for Baltimore City, in accordance with the Act of the General Assembly of Maryland 1898, Chapter

123, Section 602, and Amendment thereto. Witness our hands and seals this 16th day of May, 1946. The signatures are Judge Smith, Judge Dickerson, Judge Niles, Judge Tucker, Judge Moser, Judge Sayler, Judge Mason, Judge Manley. Mr. Folger, I noticed that on the one I just read four hundred and fifty-three names are given. On June 25th, 1946, it says seven hundred and fifty names. Is that what you have? Mr. Boyd, for the record, I turned over too many pages.

(Mr. Boyd) Don't you want to strike that out?

(The Court) All right. An order of the Supreme Bench, dated April 29th, 1946, signed by Judge Smith, Judge Sayler, Judge Niles, Judge Tucker, Judge Sherbow, Judge Mason, Judge Moser, "The undersigned Judges of the Supreme Bench of Baltimore City hereby certify that they have selected the aforegoing seven hundred and fifty names of persons qualified under the laws of the State of Maryland to be Grand and Petit Jurors of Baltimore City, in accordance with the Act of the General Assembly of Maryland, 1898, Chapter 123, Section 602, and the Amendments thereto, witness our hands this 29th day of April, 1946." Mr. Boyd, all these papers are available to you.

* * * * * *

(Tr. pp. 36-38):

Q. I asked you to bring with you records in connection with the number of the members of the negro race who have been members of the Grand Jury in Baltimore for the May term, 1946, and for other years. Have you got those records? A. You said 1946, May Grand Jury. There were six colored people submitted.

Q. There were six colored persons named on the Grand Jury list? A. Yes.

Q. How can you tell that? A. There is a copy of it that I make up from the original list. One, Willard Allen, John L. Berry, he had served on a Grand Jury

POOR COPY

BLEED THROUGH

before. Mr. Allen had served on a Grand Jury before. J. Alvin Jones, another colored man. He was in our service files. He claimed exemption on account of being a specialist for the United States government. T. W. Lansey, fifty-two, he has been on the Grand Jury before.

Q. How about Mr. Leidig? A. He is white.

Q. How do you tell they are colored? A. They are indicated on the list handed to me.

Q. When you get the list it is indicated on there? A. Yes.

(The Court) Let him finish the list of names.

(The Witness) Then there was another man, William Nelson, he served on the Grand Jury before. Sixty-four, colored. Then there is another one, Templeton. He was submitted. He never has served, being connected with the housing authorities.

Q. Following back about the fifth page, there is something called corrected list of nominations for the Grand Jury. A. When that list is submitted, that is the notations we make after our investigations. I have to give them information, telling them how many served, what are their occupations or business.

Q. You receive the original paper sent you by Judge Smith and then you re-copy that after your investigation. A. Yes.

Q. And as part of your investigation you indicate they are members of the colored race by the letter "C"? A. Yes.

Q. How many members of the Grand Jury, May term, 1946, were of the colored race? A. There were six submitted.

Q. How many were actually on the Grand Jury? A. One.

* * * * * *

(Tr. p. 42):

(The Court) The names that are negro that reach five, six, seven or eight names on your added list, do they always come from one Judge?

(The Witness) No, sir.

(The Court) They come from different Judges?

(The Witness) Yes, sir.

• • • • • •

(Tr. p. 45):

(Mr. Boyd) I know you want this to be complete. If I have omitted anything you think I should have put into the record for the benefit of my client, I humbly ask you to bring it to my attention.

• • • • • •

(Tr. pp. 63-64):

CHIEF JUDGE W. CONWELL SMITH

DIRECT EXAMINATION

(The Court) Isn't it a fact that after a Grand Jury has been unable to organize after the beginning of the term, and substitutes are sought, that the Judges will call persons whose names have been suggested to find out if they are or are not available so the Grand Jury may organize the next day?

(The Witness) Yes, when a substitute is suggested we ascertain right then and there whether he is willing to serve and is able to serve.

(The Court) Judge Smith, do you know whether in those instances persons of the negro race have been telephoned to to find out if they were available to serve the next day?

(The Witness) Yes, I recall instances where such efforts have been made.

(The Court) Were they successful or not?

POOR COPY

BLEED THROUGH

(The Witness) The ones I recall were unsuccessful.

* * * * * *

(Tr. pp. 67-68):

Q. In considering the list of prospective Jurors for the selection of the Grand Jury, do you have any particular mode or procedure. Do you start at any particular place in the Bench room or with any particular person? A. No, the suggestions for the selections are made by all the Judges and are passed upon by all the Judges with the result, as I stated before, that this selection of the Grand Jury is the result of the unanimous action of all of the Judges at a meeting.

Q. Does it ever occur that a Judge would be asked in any particular order what is their preference out of the names suggested by him? A. Of course, it is a free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury.

Q. I can understand that, but I am not sure that that answers my question. My question was do members of the Supreme Bench remembering or having their own records as to recommendations made by them ever press or are they called upon to press or given an opportunity to press what might be their first, second, or third choices for nominations to the Grand Jury? A. Yes, they can say anything they like about them or about any suggested by any other Judge.

Q. Is that done in any regular rote? A. No.

Q. You don't start with any particular member of the Bench or go around the table? A. Yes, we might start with the member who is to the left of the Chief Judge, but who happens to be there is a matter of chance. There are no regular positions at the table.

Q. You don't have place cards? A. No, nor any order according to seniority or otherwise and no Judge now so far as I recall who claims any particular chair.

* * * * * *

(Tr. p. 73):

CHIEF JUDGE W. CONWELL SMITH

CROSS EXAMINATION

Q. Judge Smith, just one question, as the Jury Judge do you make any special effort to obtain the services of qualified negro jurors? A. No more than I did to obtain the services of qualified white Jurors.

Q. The exact amount of effort, is that right, in the selection of both? A. That is right. I interviewed quite a number of prospective Jurors on successive days in May last year in the Criminal Court which were especially set aside for that purpose and in every case by personal interview with the man who was summonsed I tried to determine his qualifications as a Juror.

• • • • • •

(Tr. p. 76):

EDWARD R. FOLGER

CROSS EXAMINATION

Q. Where were these names secured, from what were they secured, the present list? A. The present list of names are taken from wards on the registration books, different precincts, and we take them from the criss-cross telephone book, from the automobile book, and the City Directories which have a pink section in the back giving the names of property owners.

Q. When you make up the cards from the list, your index cards, do you have any designation when you make the card up, as to whether that person is a member of the negro race?

• • • • • •

(Tr. pp. 77-78):

Q. Out of the sixteen or eighteen thousand you compile this list of seven hundred and fifty? A. We keep replenishing that list twice a year. So many people

POOR COPY

BLEED THROUGH

are overage, some of them have died, some of them have left the City, we have a lot that we had to take out because they were in the Navy, in the Army. A lot of them were excused for the duration.

Q. After you have compiled this list of seven hundred and fifty names, you have made a complete investigation of the individuals? A. Of Petit Jurors?

Q. Yes. A. No, we send him a pink slip through the mails. He comes before the Jury Judge just as I have in here (indicating). He is examined.

Q. Did you send out seven hundred and fifty? A. No, we send about eighteen hundred or two thousand names.

Q. After they are examined by the Jury Judge as to their qualifications, what do you get back from the Jury Judge? A. He does that right in front of us. We call four hundred a day. We use a whole week, four hundred a day.

Q. After you have completed your list at the time of the examination by the Jury Judge, what do you do with that? A. We make out a special card for him, we post his name, occupation, residence, how long he has lived in the State of Maryland, have you ever filled out a questionnaire. He says no. What months do you prefer for service. No service. You mark on there no preference.

* * * * * *

(Tr. pp. 82-85):

EDWARD R. FOLGER

RE-DIRECT EXAMINATION

(Mr. Boyd) Mr. Folger keeps records and I understood him to testify that the Grand Jury is selected from the list of nominations supplied by the Chief Judge and not from any other list.

(The Court) If you have that impression I should clear it up now. Mr. Folger, do you send into the Supreme Bench the list of the seven hundred and fifty names, plus the other names?

(The Witness) Yes, sir.

(The Court) Are you present in the Supreme Bench room or do you know what takes place in the Supreme Bench room?

(The Witness) No, sir.

(The Court) When do you next hear what the Supreme Bench has done with respect to the Grand Jury?

(The Witness) The nominations we have. The Chief Judge makes the original of the nominations——

(The Court) No, after the Supreme Bench picks out twenty-three people, are you told who they are?

(The Witness) Yes, by a sheet made up by the Clerk of the Supreme Bench, Mr. Mooney.

(The Court) After you have submitted the full list of seven hundred and fifty names plus the added names to the Supreme Bench, your next contact with it is a list of twenty-three names which you get from Mr. Mooney?

(The Witness) That is right.

(The Court) Do you check that list of names against anything?

(The Witness) No.

(The Court) What do you do with it?

(The Witness) Put it in our book for convenience.

(The Court) Is that a part of your records?

(The Witness) Yes.

POOR COPY

BLEED THROUGH

(The Court) Do you in any way know how those twenty-three names were selected?

(The Witness) No.

(The Court) Your next step is from Mr. Mooney when he hands you a paper with twenty-three names on it?

(The Witness) That is right.

(The Court) All you do is file it?

(The Witness) Yes, sir.

(The Court) You don't summons the Grand Jury?

(The Witness) No.

(The Court) Do you take it to the Clerk of the Criminal Court?

(The Witness) No.

(The Court) Do you give it to the Sheriff?

(The Witness) No.

(The Court) All that machinery is done by the Supreme Bench too?

(The Witness) Yes, sir.

(The Court) You are just the custodian of these records?

(The Witness) Yes, sir.

(The Court) Mr. Boyd, I am afraid you got the wrong impression.

* * * * * *

(Tr. pp. 97-99):

(Mr. Boyd) Mr. Mooney. I will want to have the official records of the May term, Grand Jury, in comparison with the nominating list of the May term Grand Jury. Possibly those of other Grand Juries. If Mr. Folger, I will ask you to guide me, is not the one who

could testify conclusively to the number of colored Grand Jurors, then I would like to have an offer of the information by which I could produce the correct information.

(The Court) I do not know how you are going to be helped. So far as this individual Judge is concerned, I have not been concerned with it. From my advent on the Bench, the letter "C" was stricken out of the Petit Juror lists and has never appeared since that time, not as a result of my sole action, but because every member on the Bench at or about that time felt that such a designation ought not go unchallenged. I have never been in Mr. Folger's office in my life except to say hello. I don't know where his cards are kept.

(Mr. Boyd) That is right, but that might lead one to believe that there is nowhere any designation through this process for the selection of colored persons or not. That is not the fact.

(The Court) After twenty-five years of trial experience and a couple of years on the Bench—in the last two or three years, no trial lawyer knows out of the Petit Jury list who is white or colored unless he makes it his business to inquire of the color of some certain person. There is nothing on the printed list to show it.

(Mr. Boyd) We were talking about the Grand Jury.

(The Court) It does not appear on any list that you get and I do not know that Mr. Folger would disclose it to anybody. When the list of the twenty-three names on the Grand Jury is published, there is no letter "C" or the words colored or white published on any list. You are dealing with the problem that precedes the final publication of the list.

• • • • • •

POOR COPY

BLEED THROUGH

(Tr. pp. 106-107):

LAWRENCE R. MOONEY

DIRECT EXAMINATION

(The Court) Tell us who signed the Jury book list for the May term, 1946, if you have it there?

(The Witness) For what term?

(The Court) The May term, 1946. Mr. Boyd, I assume this is the information you want.

(Mr. Boyd) Part of it.

(The Witness) That Judges that signed were W. Conwell Smith, J. Abner Sayler, Emory H. Niles, John T. Tucker, Joseph Sherbow, E. Paul Mason, and Henry M. Moser.

(The Court) Now, Mr. Boyd, I asked you whether or not you wish me to disqualify myself, having signed the very list that is involved in this case.

(Mr. Boyd) The question having occurred to you, I think the answer could just as well. I haven't any desire to disqualify you. I am not afraid of any decision I shall get.

(The Court) I am being very particular as we take this case step by step to safeguard every right this traverser has. The man I have never seen and do not know his name, except by looking at the Indictment. Are you making any motion for the disqualification of the Court in this case?

(Mr. Boyd) I am not. The Court knows the facts better than I do. Disqualification is an action that must take place only by the Court per se. If you think you are disqualified, you have the belief for that far better than I do.

(The Court) It is not that at all. Do you have any motion to make on the subject of my disqualification?

I don't mind saying very personally that I do not feel in the slightest disqualified by reason of the fact that I signed the Jury list, but if you do, I want to know it at this stage.

(Mr. Boyd) I don't believe that fact is indicative one way or another. The fact that you did is not a controlling factor.

• • • • • •

(Tr. pp. 122-123):

(The Court) Right at that point the expression fifty name list has been used, will you tell us some of the other totals, other than fifty that have been on the list?

(Mr. Boyd) It came in before, it came in by Judge Smith, but I am willing to have it.

(The Court) Yes, but I am just checking from records I have here. I would like Mr. Mooney to tell how many were on the list at different times.

(The Witness) I haven't counted all the lists, but I would say it varies from forty-two to sixty-two.

(The Court) As low as forty-two?

(The Witness) Possibly on one or two occasions.

(The Court) And as high as sixty-two?

(The Witness) Yes, sir.

(The Court) When the expression fifty is used, can you say other than that term that it was exactly fifty? A. I cannot.

(The Court) I want that in because the fact that it is an even number may give a misinterpretation. There is no fixed number. It may run anywhere from forty-two to sixty.

• • • • • •

POOR COPY

(Tr. pp. 125-127):

EDWARD R. FOLGER

RE-CROSS EXAMINATION

Q. Mr. Folger, you testified originally in direct examination by Mr. Boyd that you received the Judges' nominations list, so called, of fifty names more or less, and then you made individual investigations of those individuals named on that list. I want to ask you in reference now to the May, 1946 Grand Jury list of nominations. When you received the Judges' nominations list, which in May consisted of fifty names, did you make an investigation of each of those individuals? A. Only to the ones we have in our files.

Q. Did you take that entire list of fifty names and compare those names with your regular service file list? A. Yes.

Q. You testified before that your service file consisted of about sixteen thousand names, is that right? A. Yes.

Q. I ask you with particular reference to the May, 1946, Grand Jury nominations, you made an investigation and checked those names, those fifty names with your service file? A. Yes.

Q. Did you prepare a copy to go back to the Supreme Bench with a list of the qualifications of the individuals? A. Eleven copies.

Q. Is that (indicating) a copy of the list you sent back with the qualifications of the individuals on that list? A. Yes.

Q. Tell us how many of those names on the original list of fifty that you received from the Supreme Bench were in your service files already? A. I should say about one, one that was not in our files.

Q. So you had forty-nine in your files? A. Yes.

Q. Would you turn to the list of twenty-three, the Grand Jury as so certified, and tell us how many of those names in the May Grand Jury list were already in your service files? A. All of these were.

• • • • • •

(Tr. pp. 149-150):

JUDGE EMORY H. NILES

DIRECT EXAMINATION

(The Court) They are already in. Will you look at the first Exhibit if you please? Do you have that?

(The Witness) No.

(Mr. Murrell) I beg your pardon. This is Defendant's Exhibit D (indicating).

(The Court) Who is number one on that list?

(The Witness) Willard W. Allen.

(The Court) Do you know whether he is a member of the negro race?

(The Witness) I know he is.

(The Court) Who is number three?

(The Witness) John L. Berry.

(The Court) Is he a member of the negro race?

(The Witness) He is.

(The Court) So the original selection of the May, 1946, Grand Jury as signed and certified by the Supreme Bench of Baltimore shows two members of the negro race selected for the May, 1946, Grand Jury, is that right? A. That is right.

• • • • • •

(Tr. pp. 150-152):

(The Court) Then upon excusing Willard W. Allen and John L. Berry, both members of the negro race, it

POOR COPY

BLEED THROUGH

became necessary to have what kind of a meeting of the Supreme Bench?

(The Witness) A special meeting.

(The Court) Was that meeting called?

(The Witness) It must have been because here (indicating) is the order signed by most of the Judges.

Q. At that meeting, were substitutions for Mr. Allen and Mr. Berry made? A. They were.

(The Court) I think the name Triplett was some kind of an error in the first name. Leaving Mr. Triplett out, who was substituted for Mr. Allen and Mr. Berry?

(The Witness) The substitutions are not made specifically one person for another. There were three substitutions made for three persons excused.

(The Court) Those three substitutions were?

(The Witness) Ferdinand Meyer, T. Wallace Lansey and Clayton N. Triplett.

(The Court) Mr. Lansey is colored, is that right?

(The Witness) I don't know. I am told he is but I don't know it.

(The Court) You don't know him yourself?

(The Witness) No.

(The Court) Out of the twenty-three names and the three substitutions making twenty-six, if we count Mr. Triplett as two persons, there were three members of the negro race actually selected by the Supreme Bench of Baltimore City?

(The Witness) That is right.

• • • • • •

(Tr. pp. 153-154):

(The Court) With reference to the selection of Jurors, for the purposes of the record, will you state what, if anything, you did and what action was taken by the Supreme Bench toward eliminating any designation on the Petit Jury list of persons of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled. And can you give approximately the date?

(The Witness) I can't give you the date except my recollection is that it was about two years ago. It seemed to me it was improper to have the designation "C" for colored on the Petit Jury lists. I expressed that opinion. I found that that was agreed with by several other judges. Instructions were given informally to have the "C" eliminated. All Jury lists now show the lists of the names without any designation with respect to color.

(The Court) Was that action taken unanimously by the Supreme Bench?

(The Witness) I can't recall. It was the opinion of the Judges of the Bench that that ought to be done, but the formal mechanics of it I don't remember.

(The Court) The letter "C" which had appeared on the printed Jury lists for Petit Jurors after 1945 or thereabouts no longer appeared?

(The Witness) That is right.

(The Court) Do you know of any designation on the Grand Jury Lists that are made public that denote whether a person named is of the negro race or not?

(The Witness) I haven't examined the published lists but my impression is there is no designation to indicate color.

POOR COPY

IN THE COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1947, No. 177

SAM ZIMMERMAN, Appellant,

v.

STATE OF MARYLAND, Appellee

Appeal from the Criminal Court of Baltimore City

OPINION BY HENDERSON, J., filed June 16, 1948

The appellant, a negro, was tried and convicted of murder in the first degree, in the Criminal Court of Baltimore City, and sentenced to life imprisonment. Through his counsel, appointed by the court, he filed a motion to quash the indictment on the grounds that the Grand Jury which returned the indictment was not selected in accordance with the laws of Maryland, and that the method of selection violated the appellant's rights under the Federal Constitution. The appeal challenges the correctness of the court's ruling in refusing this motion, and also the rulings of the court in excluding evidence offered in support of the motion.

The Charter and Public Local Laws of Baltimore City (1938 ed.), prescribe the method of selecting grand and petit jurors. §687 provides: "The Judges of the Supreme Bench of Baltimore City, or a majority of them, shall * * * select fairly and impartially, and by the exercise of their best judgment, the names of seven hundred and fifty persons, or thereabouts, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore. * * *." §689 provides: "The said list of persons, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore, having been prepared as aforesaid, it shall be the duty of the said Judges of the Supreme Bench of Baltimore City, or a majority of them, * * * to select from said list the names of twenty-three persons, who shall constitute and be the grand jurors for the City

of Baltimore for the ensuing term of said Criminal Court of Baltimore; * * *". §694 provides: "The said Judges of the Supreme Bench * * * shall * * * after the selection of the grand juries for the City of Baltimore, as provided in Section 689, cause all the names selected by the Judges as aforesaid, remaining upon said list of qualified jurors, to be inscribed upon ballots, which * * * shall be placed by one of such Judges, with his own hands, on the day of said meeting and immediately before the drawing herein provided for, in a drawing wheel provided for that purpose by the Sheriff of Baltimore City, under the direction of said Judges; * * *." From four to five hundred names are thus drawn by lot to serve upon the petit juries.

It may be noted that the Judges are directed to "select" the Grand Jury. This provision was adopted by ch. 67 of the Acts of 1882. Prior to that time, the names were drawn from a wheel, the first twenty-three constituting the grand jury, a practice which prevails in most of the counties. Compare Code, Art. 51 §10. We may assume that the change was designed to improve the quality of the grand juries and obtain the services of competent and impartial persons to exercise the important dual functions of passing upon all serious charges of crime and investigating the operation of the penal, law enforcement and other public institutions and agencies of a large urban community. After selection, the Grand Jury serves for a period of four months, whereas the petit juries serve for only three weeks.

As shown by the testimony, the practice has departed somewhat from the procedure outlined in the Statute. For many years a special jury clerk has been employed to prepare and keep up to date a jury service file containing the names of some 18,000 eligible residents, who are carefully selected from tax lists, voting lists, the telephone book, the automobile book, and the City Directory. Persons so selected are summoned to appear before one of the Judges of the Supreme Bench, designated as Jury Judge, for examination as to their qualifications. (Rule 1 of the Supreme Bench). Upon approval, their names, with all pertinent information, are put in a card index system.

POOR COPY

BLEED THROUGH

Prior to the commencement of each term of the criminal court, the jury clerk selects from the file and presents to the Supreme Bench a list of seven hundred and fifty names.

Each of the eleven Judges of the Supreme Bench also submits to the Chief Judge, prior to the commencement of each term, nominations of persons known to him to be qualified, which may vary in number from two to fifteen. This composite list, which varies from 42 to 62 names, is turned over to the jury clerk, who checks their age, occupation, residence, race, prior jury service and other like information. This list of nominations is then returned to the Chief Judge. Selections for the grand jury are made from this list, or from the list of 750 names above mentioned, by unanimous action of the Judges. In case any of the twenty-three persons selected requests to be excused from serving, the request is customarily granted, and another meeting is called to fill the vacancy.

The appellant was indicted by the Grand Jury for the May Term, 1946. As originally selected, it contained the names of two negroes, both of whom requested to be excused from serving. At a special meeting, a white man and a negro were selected to fill the vacancies. All of the twenty-three persons who served had previously been listed in the jury service file. After selection, the names published contained no designation as to race, nor did the list of petit jurors drawn from the wheel. There was, however, a designation of race upon the original lists.

The appellant contends that the record shows that the statute was not complied with, because selection is customarily made from the list of nominations, rather than from the list of 750 names prescribed by the Statute. In every instance since 1940, it was shown that the names ultimately selected for Grand Jury service appeared on the list of nominations, although in a few instances the names also appeared on the list of 750. We think the objection is without merit.

§709 of the Charter provides that "all the provisions * * * relating to the mode of drawing and summoning

jurors shall be construed as directory merely, and no indictment * * * shall be quashed * * * because of any failure by the Judges, or the Clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; * * *." Even in the absence of such a provision, this court has held that statutory provisions relating to the selection of a grand or petit jury are directory. *King v. State*, ... Md. .....; No. 130 October Term, 1947, and cases there cited. The statute imposes a duty of personal selection upon the Judges, and if, in the performance of that duty, an investigation and preparation is made in advance of the meeting and consideration of the larger list, we think there is substantial compliance with the statutory object. The statute, adopted prior to the time when the Supreme Bench established the jury service file under the supervision of the Jury Judge and Jury Clerk, contemplated personal selection by the Judges, or a majority of them, of each name upon the list of 750. Personal selection of the Grand Jury from a smaller list does not do violence to the statutory scheme, but makes that scheme more workable.

The appellant states in his brief that he does not "seek to have the indictment * * * quashed solely because of non-compliance with the charter provisions", but contends that non-compliance "has been one of the factors permitting * * * discrimination against negroes." We think, however, that in considering the question of discrimination, the answer cannot depend upon the mere size of the list from which the selection is made. The possibility of discrimination would seem to be present in either case.

The main point urged by the appellant is that the record shows an intentional and systematic limitation in the number of negroes serving upon Grand Juries in Baltimore City, and that this constitutes discrimination, in violation of the equal protection clause of the 14th amendment to the Federal Constitution. There can be no doubt that where the evidence shows a total exclusion of negroes, prejudice may be inferred. *Jackson v. State*, 180 Md. 658; *Lee v. State*,

POOR COPY

BLEED THROUGH

163 Md. 56; *Lee v. State*, 164 Md. 550, cert. den. 270 U.S. 639. In the first Lee case, the Court, speaking through Chief Judge Bond, said (p. 66) with reference to the selection of petit jurors by the Jury Judge in Baltimore County: "His system of drawing jurors begins with a collection of names of white eligibles, and hence is confined from the beginning to the selection of white men. Only the white men appear to have been looked to for jurors. The evidence, with the long, unbroken absence of negroes from the juries selected, seems to show an established practice, confining selections to white men as effectually as if such a restriction were prescribed by statute. And this court has concluded that this, under the authorities, amounts to unconstitutional exclusion of negroes." (Citing *Virginia v. Rives*, 100 U.S. 313, *Neal v. Delaware*, 103 U.S. 370, and *Carter v. Texas*, 177 U.S. 442.) In the second *Lee* case, where the names of six negroes were included in the panel of 200, it was held that no discrimination was shown.

The appellant contends, however, that under the recent decisions of the Supreme Court limitation in the number of negroes selected is as offensive as total exclusion. In *Akins v. Texas*, 325 U.S. 398; 89 L. Ed. 1692 (1945), the Supreme Court, speaking through Mr. Justice Reed, said: "This discrimination was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found. This is petitioner's only complaint as to racial discrimination." The Court pointed out that the petitioner was not entitled to proportional racial representation upon the jury, but only to require that it be selected without discrimination against his race. Although there was testimony from the three Jury Commissioners that they intended to select, and did select, only one negro upon that panel, the court was "unconvinced that the commissioners deliberately and intentionally limited the number of negros on the grand jury list." The court said: "This conclusion makes it unnecessary to decide whether a purpose-

ful limitation of juries by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment." In his dissenting opinion, Mr. Justice Murphy said: "Racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause." He also said: "If a jury is to be fairly chosen from a cross section of the community, it must be done without limiting the number of persons of a particular color, racial background or faith, all of which are irrelevant factors in setting qualifications for jurors. This may in a particular instance result in the selection of one, six, twelve or even no negroes on a jury panel."

Whatever the exact scope of the decision in the *Akins* case, we think the majority opinion recognized that selection, other than by lot, is not a valid objection. In dealing with the Texas statute providing for personal selection by jury commissioners, the Court said (325 U.S. p. 402): "This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith v. Texas*, 311 U.S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot." This view seems to be supported by the later decisions of *Fay v. New York*, 332 U.S. 261; 91 L. Ed. 2043, and *Moore v. New York*, ... U.S. .....; 92 L. Ed. 637. We find nothing in these decisions, except the intimations in the dissenting opinions, to indicate that chance, and chance alone, must determine the composition of a particular jury. And while the question whether a deliberate policy of proportional representation would vitiate a particular panel, was left open in the *Akins* case, we think the proof of such a policy is lacking in the case at bar.

Chief Judge Smith testified that since his appointment as chief judge in September, 1944, seven grand juries were selected, to and including the May Term 1946. During that period the nominations of the judges for each panel varied

POOR COPY

BLEED THROUGH

from 43 to 54, while the number of negroes nominated varied from two to six, the number nominated for the May term, 1946, being six out of fifty. During that period eleven negroes were selected to serve, and nine did serve. Edward J. Folger, Jury Clerk, testified that prior to 1944 he usually put the names of about 25 negroes on the list of 750, but since 1944, he had put from 40 to 60. The list for the May term, 1946, contained the names of 50 negroes. From 1910 to 1944, his records show that one negro served on every Grand Jury.

The Appellant called former Chief Judge Dennis, who served from 1928 until August 1944, as a witness, and offered to prove by him that during that period it was the established practice of the Supreme Bench to limit the negro members of the Grand Jury to one, "no more than one, and not less than one." He made the same proffer of testimony from three other retired Judges serving prior to 1944. This testimony was excluded, on the ground that there was no offer to show that the same practice continued after 1944.

For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted. Mr. Folger's testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two negroes who were excused from serving. The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946.

The appellant lays stress upon the conceded fact that negroes constitute about 19% of the total population of

the City. But that fact throws little light upon the proportion of eligibles. In *U.S. ex. rel. Jackson v. Brady*, 47 F.S. 362, 365 (1942), Judge Chesnut, sitting in the District Court, considered the question whether there had been a systematic exclusion of eligible negroes from the petit juries in Baltimore City. He said: "The evidence shows that while the proportion of the colored population to the white is about 20%, the percentage of negroes qualified, able and willing to serve as jurors is probably much less in proportion to the whole number of white persons qualified and available as possible jurors. Many negroes (probably the older ones) do not have sufficient educational qualifications; until recently a very large proportion in comparsion to the white population has been on relief; the percentage of conviction of crime of negroes is unfortunately higher than that of the whites; and many otherwise qualified negroes are exempt or excused from service on account of their occupation, either professional or industrial." He found as a fact that the jury service file, in 1941 and 1942, contained the names of 18,901 whites and 653 negroes, a proportion of 3.34%; that the list of 750 names contained the names of only 25 negroes, and that the panel of 50 from which the petit jury was selected contained the names of only two negroes. He found no evidence of discrimination in these facts. This ruling was affirmed on appeal (133 F (2) 476; cert. den. 319 U.S. 746). The same point was made in *Lee v. State*, 163 Md. 56, 65, where it was shown that the negro population of Baltimore County was about 10% of the total. The court said: "But it should be remembered that these numbers do not present an accurate statement of the proportion of eligible negroes, because of differences in the economic and other conditions of the races. There is a much larger proportion of the negroes than of the whites in the class of workers who could serve on juries only at the cost of a prohibitive sacrifice of earnings and employment."

In the case at bar there was no evidence of the proportion of negroes upon the jury service list, but there was evidence that the names of 50 negroes were placed on the

POOR COPY

list of 750, a proportion of 7½%. The appellant has not challenged the validity of that list. The proportion of negroes upon the list of nominations for the Grand Jury was 6 out of 50, or 12%. Out of 23 persons originally selected to serve, 2 were negroes. These facts tend to corroborate, not to impeach, the testimony of Chief Judge Smith and the other Judges who testified, that there was no discrimination against negroes.

In the absence of proof of a long continued and invariable practice, the fact that only one negro served on the particular jury is without significance. *Akins v. Texas*, supra. We think the appellant has failed to meet the burden of establishing a deliberate and intentional limitation on account of race or color, in the selection of the Grand Jury which indicted him, and that the finding of the trial court was supported by the weight of the evidence.

The appellant contends that the trial court erred in declining to sign an order permitting him to prosecute this appeal at the expense of the State. Code, Art. 5, §88A (as enacted by ch. 1068 of the Acts of 1945) authorizes an appeal *in forma pauperis* "in any case where a sentence of death is imposed." This section is clearly not applicable. We know of no other statute, or rule of court, which would authorize the passage of such an order. Even in a *habeas corpus* case, where the statute (code, Art. 42 §3c) permits the waiver of costs, we have denied an application for appeal *in forma pauperis*. *Olewiler v. Brady*, 185 Md. 341, 348. We find no error in the ruling of the trial court, even if such ruling were appealable.

Judgment affirmed, with costs.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 118, Misc.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Maryland

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—November 22, 1948

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 429. The case is placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the writ of certiorari.

FILE COPY

FILED
DEC 27 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR PETITIONER

J. Cookman Boyd, Jr.,
Henry M. Decker, Jr.,
Baltimore, Maryland,
Counsel for Petitioner.

TABLE OF CONTENTS

	Page
Reference to Opinion in the Court Below	1
Jurisdiction	2
Statement of the Case	2
Errors Below Relied on Here	9
Argument:	
I. The Trial and Conviction of a Negro Upon an Indictment Found and Returned By a Grand Jury on Which the Number of Negro Members Has Been Limited Solely on Account of Race or Color, Pursuant to an Established, Systematic and Continuous Practice, Is a Denial of the Equal Protection of the Laws as Guaranteed By the Fourteenth Amendment to the Constitution of the United States	10
II. Petitioner, By Showing a Long-Continued and Systematic Limitation of the Number of Negroes Selected for Grand Jury Service in the City of Baltimore, Made a *Prima Facie* Showing of Unconstitutional Racial Discrimination in the Selection of Grand Juries in the City of Baltimore, Which the State Failed to Rebut	20
III. Petitioner's Rights Were Prejudiced By the Trial Court's Rulings on Evidence at the Hearing on Petitioner's Motion to Quash the Indictment Against Him	25
IV. The Grand Jury Which Indicted Petitioner Was Not Selected in Accordance With the Methods Prescribed for the Selection of Grand Juries By the Charter and Public Local Laws of Baltimore City	29
V. Conclusion	30

TABLE OF CASES CITED

Akins v. *Texas*, 325 U. S. 398, 89 L. ed. 1692	10, 11, 13
Bush v. *Kentucky*, 107 U. S. 110, 27 L. ed. 354	10
Carter v. *Texas*, 177 U. S. 442, 44 L. ed. 839	10
Hale v. *Kentucky*, 303 U. S. 613, 82 L. ed. 1050	10
Hill v. *Texas*, 316 U. S. 400, 86 L. ed. 1559	10, 13, 20
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. ed. 1500	10
Neal v. *Delaware*, 103 U. S. 370, 26 L. ed. 567	10, 21
Norris v. *Alabama*, 294 U. S. 587, 79 L. ed. 1074	2, 10, 21
Patton v. *Mississippi*, 332 U. S. 463, 92 L. ed. Adv. Ops. 164	11, 20
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. ed. 757	10, 21
Rogers v. *Alabama*, 192 U. S. 226, 48 L. ed. 417	10
Smith v. *Texas*, 311 U. S. 128, 85 L. ed. 84	10, 11, 20
Strauder v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664	10
U. S. ex rel. Jackson v. *Brady*, 47 F. Supp. 362 (D. C. 1942)	22

Page

U. S. ex rel. Jackson v. *Brady*, 133 F. 2nd 476 (CCA 4) 22
Virginia v. *Rives*, 100 U. S. 313, 25 L. ed. 667 10

STATUTES CITED

Charter and Public Local Laws of Baltimore City (1938 Ed.), (Sections 687, 689, 694 and 709) 8, 9
Constitution of the United States, Fourteenth Amendment 9, 10, 11
United States Code:
Revised Title 28, Sec. 1257 (3) and Sec. 2106 2
United States Code, Annotated:
Title 28, Sec. 344 (b) .....
United States Judicial Code, Sec. 237 (b) .....
43 Stat. 937 .....

POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

Opinion in the Court Below

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It appears in 59 A. 2d 675, at pages 194-206 of the Transcript of Record,[1] and at pages 67-75 of the printed Record.[1] The opinion of the Crim-

[1] The term "Transcript of Record" and symbol "Tr." as used throughout this brief refer to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "Record" and symbol "R." shall be used to refer to the printed portions of the Record, as filed by petitioner and respondent in the Court of Appeals of Maryland, and the opinion of that Court, and which now constitute the printed record in this Court.

inal Court of Baltimore City was an oral one, and appears at pages 175-189 of the Transcript of Record, and at pages 1-9 of the Record.

Jurisdiction

The final decision of the Court of Appeals of Maryland, the court of last resort in that State, affirming the judgment of the Criminal Court of Baltimore City, was entered on June 16th, 1948. Certiorari to review the judgment of the Court of Appeals of Maryland was granted by this Court on November 22nd, 1948, upon a petition therefor filed on September 13th, 1948, and based upon Section 1257 (3) and Section 2106 of revised Title 28, United States Code.

As to the jurisdiction and duty of this Court to make an independent determination as to underlying questions of fact, where the claim is made that a Federal right has been denied, see *Norris* v. *Alabama*, 294 U. S. 587, 590; 79 L. Ed. 1074, 1077, and cases there cited.

Statement of the Case

Petitioner, a Negro citizen, was indicted by a grand jury of the State of Maryland for Baltimore City, composed of twenty-two white men and one Negro, on or about September 5th, 1946, charged with the crime of murder (Tr. 4-6). A motion to quash the indictment was seasonably filed by Court-appointed counsel for petitioner (Tr. 7-10, and, after hearing, the Criminal Court of Baltimore City overruled said motion on April 21st, 1947 (Tr. 189; R. 9). On the same day, petitioner pleaded Not Guilty, elected to be tried by a judge without the aid of a jury, and was convicted of murder in the first degree. Petitioner's motion for a new trial was overruled by the Supreme Bench of Baltimore City, and, on December 5th, 1947, petitioner was sentenced to life imprisonment in the Maryland Penitentiary. On December 15th, 1947, petitioner noted an appeal to the

POOR COPY

Court of Appeals of Maryland where, after the filing of briefs and argument, the judgment of the lower court was affirmed (Tr. 206; R. 75).

The Supreme Bench of Baltimore City, consisting of a Chief Judge and ten associate judges, selects a grand jury for the City of Baltimore for each of the three terms of court (January, May and September) in every year, each grand jury being selected shortly before the beginning of the term in which it is to serve. Such grand juries are always composed of twenty-three members.

At the hearing on petitioner's motion to quash the indictment, the method and system of selecting grand jurors for Baltimore City were fully testified to by the Jury Clerk of the Supreme Bench of Baltimore City, who had served for more than 20 years in that position, by the Deputy Clerk of the Supreme Bench of Baltimore City, and by the present Chief Judge and two associate judges of the Supreme Bench of Baltimore City. Petitioner tendered and re-tendered the testimony of a former Chief Judge and three former associate judges of the Supreme Bench, but, upon objection by the State, the tenders were refused by the court.

Testimony produced at the hearing on petitioner's motion to quash the indictment brought to light the following significant facts:

The grand jury for the May term, 1946, which found and returned the indictment against petitioner, was composed of twenty-two white men and one Negro (Tr. 25). From the year 1910, up to and including the grand jury for the May term, 1946, on every grand jury there has served no more and no less than *one* Negro, with two exceptions, both in 1945, when two Negroes served on each of two grand juries (Tr. 39-40, 170-171; R. 11, 46). *Thus, in 36⅔ years, out of 110 grand juries for Baltimore City,*

108 have had one Negro member, 2 have had two Negro members, and none of the grand juries has had no Negro member.

Two Negroes were actually selected for the May term, 1946, grand jury, but both of these Negroes asked to be excused, and a white man and a Negro were selected as substitutions, only one Negro, therefore, actually serving (Tr. 171; R. 46-47).

As to the method by which grand juries are selected, the following was shown:

Associate Judge J. Abner Sayler, who has served on the Supreme Bench since 1937, testified that, since he has been on the Bench, grand juries "have been selected in one manner" and that he knows of nothing unusual about the selection of the grand jury for the May term, 1946 (Tr. 141; R. 36).

Chief Judge W. Conwell Smith testified that the method of selecting grand juries has been the same since 1938, when he came on the bench (Tr. 47-48; R. 13). After the trial court had afforded Judge Smith the unusual opportunity of going over the incomplete record in the case, after he and the other judges had testified (Tr. 167; R. 44), Judge Smith, of his own volition, reappeared as a witness and testified, from a prepared statement, that "While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced." (Tr. 169; R. 45) Except for the showing that two Negroes served on each of two grand juries in the year 1945, there is no evidence from any other source to support this latter statement by the Chief Judge.

POOR COPY

The Record shows that it has been the custom for the ten associate judges of the Supreme Bench of Baltimore City, in advance of each term of court, to submit to the Chief Judge certain names of persons they feel are qualified to be members of the grand jury (Tr. 48; R. 13). These suggested names are referred by the Chief Judge, in turn, to the Jury Clerk (Tr. 48; R. 13) in the form of a composite list of all the suggested names (Tr. 53; R. 16). On this composite list the name of each Negro is indicated by a "C" or "Col" placed beside his name (Tr. 37, 44-45, 88; R. 12). The Jury Clerk, upon receipt of this list of suggested names, investigates the persons whose names are thus submitted (Tr. 53; R. 16), checks with the Criminal Court and the Supervisors of Elections in order to find out the color of the persons suggested (Tr. 44; R. 12), and reports their age, occupation, home address, whether they have served on juries before, if so, where, and other like information (Tr. 53; R. 16). The original list is then re-copied by the Jury Clerk, the information added, and, again, on this re-copied list, the names of all Negroes are distinguished by the letter "C" (Tr. 38, 53-54, 156; R. 17). Each of the judges (Tr. 26) then receives a copy of the re-copied list in the form of a "report list which is confidential", such list showing a "designation as to members of the Negro race." (Tr. 156) The Jury Clerk, in addition, turns over to the Clerk of the Supreme Bench, together with a list of 700 or 750 names of qualified petit jurors (Tr. 20-21; R. 10), a copy of the revised list of names suggested for grand jury duty, the expression "Grand Jury Nominations" appearing at the top of said latter list (Tr. 104; R. 23). The Clerk of the Supreme Bench, upon receipt of these two lists from the Jury Clerk, puts them in the current Jury Book and appends a certification to be subsequently signed by the Judges of the Supreme Bench indicating that the names on the lists are

qualified to serve as grand and petit jurors. When the Supreme Bench meets, the Clerk of the Supreme Bench takes the Jury Book, along with the unsigned certification of the names, to the consultation room where the judges confer (Tr. 104; R. 23). The lists of names are on the table at the Supreme Bench meeting (Tr. 57; R. 18), and some of the judges look through the list and others refer to their own files in making selections for the grand jury (Tr. 57-58; R. 19). In considering the list of prospective jurors for the selection of the grand jury, there is no particular mode of procedure. According to the testimony of Chief Judge Smith, the selections are made by all the judges and are passed upon by all the judges, with the result that the selection of the grand jury is by the unanimous action of all the judges at the meeting, there being a free and frank discussion among the judges as to the qualifications of persons to serve on the grand jury (Tr. 67). The names of Negroes finally selected for the grand jury, according to the testimony, are not suggested by any one judge (Tr. 41-42), nor by the senior member of the Bench who, before his ascendancy to the Bench, was a member of the Republican Party, although "he might think so" (Tr. 69; R. 20), and this has been so at least *since* May, 1946 (Tr. 141; R. 36). Evidence to contradict this latter testimony, offered through four former judges of the Supreme Bench, covering the years 1922 to 1945, was rejected (Tr. 130-138; R. 30-35; and Tr. 141-143; R. 36-37).

Although it was testified by Chief Judge Smith that the selections for the grand jury are made from the combined list of grand and petit jury nominations, and are not restricted to the list of names suggested by the judges solely for grand jury service (Tr. 50, 70; R. 15, 21), *in each and every instance since 1940* (records prior to that time being unavailable [Tr. 113-114]), including the grand jury which

POOR COPY
BLEED THROUGH

indicted petitioner (Tr. 114; R. 27), the names of the grand jurors ultimately selected, *without exception*, appeared on the list of names suggested to the Chief Judge by the associate judges for grand jury service. Only on four single occasions did a name selected for the grand jury appear on both the list of judges' nomination *and* the 700 or 750 name list of petit jurors (Tr. 116; R. 28). On one of these four occasions there were two names appearing on both the list of about 50 names suggested by the individual judges and on the 700 or 750 name list selected by the Jury Clerk (Tr. 117; R. 28). The grand jury for the May term, 1946, which indicted petitioner, included one name which happened to appear on both lists (Tr. 114-115; R. 27).

After the judges have selected the grand jury, the Clerk of the Supreme Bench is called to the door of the consultation room by the judge who acts as Secretary of the Supreme Bench (Tr. 108; R. 24) and is handed the list of around fifty names (Tr. 110; R. 25), marked in pencil indicating the numbers one to twenty-three (Tr. 109; R. 24). The Supreme Bench Clerk then types the twenty-three names, as marked, on an order and returns the order along with the sheets of paper with penciled numbers on them to the Secretary (Tr. 109; R. 24). The list of 700 or 750 names selected by the Jury Clerk for petit jury service remains in the consultation room all this time (Tr. 110; R. 25).

After the Supreme Bench meeting has adjourned, the Clerk of the Supreme Bench goes into the consultation room and gets the Jury Book. At that time he finds that it has been signed by the judges (Tr. 113; R. 26).

The names remaining on the grand jury nominations list after the selection of the twenty-three grand jurors are *not* put into the wheel from which the petit juries are drawn, although the Baltimore City Charter (Sec. 694)

requires that *all* names remaining after the selection of the Grand Jury shall "be inscribed upon ballots, which * * * shall be placed * * * in a drawing wheel * * *." The only names which go into the wheel are those appearing on the 700 or 750 name list selected by the Jury Clerk (Tr. 90; R. 23).

The *published* list of grand jurors, as ultimately selected, carries no designation indicating that the person is or is not of the Negro race (Tr. 54, 98-99; R. 17), nor does the letter "C" appear on the *published* list of petit jurors (Tr. 186; R. 7).

When Negroes selected for grand jury duty are excused from serving, substitutions invariably are selected only from the list of names suggested by the individual judges as qualified grand jurors (Tr. 33; R. 11).

Negroes constitute approximately 19% of the population of the City of Baltimore (Tr. 145; R. 38).

The method of selecting grand and petit juries is prescribed by the Charter and Public Local Laws of Baltimore City (1938 Ed.)[2].

---

[2] "The Judges of the Supreme Bench of Baltimore City, or a majority of them, shall * * * select fairly and impartially, and by the exercise of their best judgment, the names of seven hundred and fifty persons, or thereabouts, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore * * *" (Secs. 687, p. 394).

"The said list of persons, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore, having been prepared as aforesaid, it shall be the duty of the said Judges of the Supreme Bench of Baltimore City, or a majority of them, * * * to select from said list the names of twenty-three persons, who shall constitute and be the grand jurors for the City of Baltimore for the ensuing term of said Criminal Court of Baltimore; * * *" (Sec. 689, p. 395).

"The said Judges of the Supreme Bench * * * shall, * * * after the selection of the grand juries for the City of Baltimore, as provided in Section 689, cause all the names selected by the Judges as aforesaid, remaining upon said list of qualified jurors, to be inscribed upon ballots, which * * * shall be placed by one of such Judges, with his own hands, on the day of said meeting and immediately before the drawing herein provided for, in a drawing wheel to be provided for that pur-

POOR COPY

BLEED THROUGH

Errors Below Relied On Here

Petitioner relies on the following points:

1. The Trial and conviction of a Negro upon an indictment found and returned by a grand jury on which the number of Negro members has been limited solely on account of race or color, pursuant to an established, systematic and continuous practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner, by showing a long-continued and systematic limitation of the number of Negroes selected for grand jury service in the City of Baltimore, made a *prima facie* showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

3. Petitioner's rights were prejudiced by the trial court's rulings on evidence at the hearing on petitioner's motion to quash the indictment against him.

4. The grand jury which indicted petitioner was not selected in accordance with the methods prescribed for

---

pose by the Sheriff of Baltimore City, under the direction of said Judges; * * *" (Sec. 694, pp. 397-398).

"All the provisions of this sub-division of this Article relating to the mode of drawing and summoning jurors shall be construed as directory merely, and no indictment or presentment for any felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment or presentment, whether after verdict, by confession or otherwise, be stayed or reversed, nor shall any challenge to the array of jurors be allowed because of any failure by the Judges, or the clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; provided, nevertheless, that if any officer concerned in the drawing of said jurors shall willfully neglect to perform any duty imposed upon him by law, he shall be liable to indictment in the Criminal Court of Baltimore, and upon conviction shall be fined the sum of one thousand dollars (Sec. 709, pp. 405-406).

the selection of grand juries by the Charter and Public Local Laws of Baltimore City.

Each of the above points was decided, both by the trial court and the Court of Appeals of Maryland, erroneously in favor of the State and against petitioner.

ARGUMENT

I

The trial and conviction of a Negro upon an indictment found and returned by a grand jury on which the number of Negro Members has been limited solely on account of race or color, pursuant to an established, systematic and continuous practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The principle that the systematic and arbitrary *exclusion* of Negroes from jury panels solely because of their race or color constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution has been long established by the decisions of this Court.

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;
Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417;
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500;
Hale v. *Kentucky*, 303 U. S. 613, 82 L. Ed. 1050;
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692;

POOR COPY
BLEED THROUGH

Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164.

The principle has been applied with equal force whether the discrimination has occurred by virtue of a statute (*Strauder* v. *West Virginia, supra*; *Bush* v. *Kentucky, supra*) or by the action of administrative officers (*Neal* v. *Delaware, supra; Carter* v. *Texas, supra*), and whether the exclusion is from service on petit juries (*Strauder* v. *West Virginia, supra; Norris* v. *Alabama, supra*) or on grand juries (*Carter* v. *Texas, supra; Smith* v. *Texas, supra*).

And, the decisions of this Court make it clear that an arbitrary and systematic *limitation* of the number of Negroes selected for grand jury service, as well as *total exclusion*, is in contravention of the Fourteenth Amendment to the Federal Constitution.

Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 84;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

It is contended by petitioner that the Court of Appeals of Maryland in its decision in this case failed to follow the long line of applicable decisions of this Court. The Maryland Court of Appeals particularly refused to recognize the binding significance of this Court's opinion in the case of *Smith* v. *Texas, supra;* and, moreover, petitioner earnestly maintains that the Court of Appeals of Maryland misconstrued the theory upon which this Court decided the *Akins* case, *supra.*

Reference to the petition for certiorari in the *Smith* case shows that the "sole question for decision" raised by the petitioner there was:

> "Must a negro defendant in a State Criminal Court introduce evidence showing a *total exclusion* of members of his race from grand juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a

> State tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment?" (p. 4 of Petition for Writ of Certiorari, *Smith* v. *Texas, supra,* 311 U. S. 128, 85 L. Ed. 84).

This Court, in reversing the conviction of the petitioner in the *Smith* case, recognized in its opinion that there had not been a *total exclusion* of Negroes:

> "• • • Chance and accident alone could hardly have brought about the listing for grand jury service of *so few* negroes • • • (Italics supplied).

Actually, it is believed by petitioner that this Court used the term "exclusion" in the *Smith* case synonymously with "limitation", for it follows that if there has been a *limitation* of Negroes, some Negroes have been excluded.

A careful reading of Mr. Justice Black's opinion in the *Smith* case indicates that the test there applied by this Court actually was not one of *exclusion* or *limitation;* but, on the contrary, the *Smith* case was decided on the broader question of whether or not the evidence showed *discrimination.*

> "• • • If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." (*Smith* v. *Texas, supra,* 311 U. S. 128, 132; 85 L. Ed. 84, 87).

And, it is respectfully submitted, the question of whether or not Negroes have been *discriminated against* in the selection of grand juries in the City of Baltimore is the test which should be applied by this Court here; not whether Negroes have been *limited* or *excluded,* but whether there has been *discrimination.*

In determining whether there has been such discrimination, this Court is not bound by the findings made by the lower court, but has the jurisdiction and the duty to make

POOR COPY

BLEED THROUGH

an independent inquiry and determination of the disputed facts, especially where the conclusions of the lower court are so lacking in support in evidence that to give them effect "would work that fundamental unfairness which is at war with due process."

Akins v. *Texas, supra;*
Smith v. *Texas, supra;*
Pierre v. *Louisiana, supra;*
Norris v. *Alabama, supra.*

The case of *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692, brought before this Court no novel question. The *Akins* case must be considered, as this Court did in fact consider it, in connection with the earlier case of *Hill* v. *Texas*, 316 U. S. 400, 86 L. ed. 1559, where the conviction of a Negro defendant was reversed because of racial discrimination in the selection of grand jurors. In the *Akins* case, this Court expressly recognized the fact, as was shown by the evidence, that

> "• • • the courts of Texas • • • endeavored to comply with the Federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, supra. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color."

Thus, in the *Akins* case, evidence of a *continual* and *systematic* discriminatory exclusion or practice was found to be lacking, because the method so obviously followed by the Texas courts prior to the *Hill* case was found by this Court to have been abandoned subsequent to the *Hill* case.

As was pointed out by Mr. Justice Reed in the *Akins* case, the grand jury which indicted the petitioner Akins was but the second grand jury selected after the *Hill* case.

> "• • • Purposeful discrimination is not sustained by a showing that *on a single grand jury* the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue *a course of conduct* which results in discrimination 'in the selection of jurors on racial grounds'. Hill v. Texas, supra, (316 U. S. 404, 86 L. ed. 1562, 62 S. Ct. 1159). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on *the theory that their continual exclusion indicated discrimination* and not on the theory that racial groups must be recognized. Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, and Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present *which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.* • • •" (Italics supplied.)

It may be readily seen that the *Akins* case involved a *single* grand jury. The "continual" and "systematic" discrimination required by the decisions of this Court was not, and could not be, shown in the *Akins* case because of

POOR COPY

BLEED THROUGH

the definite, proven change which had taken place in the Texas method for the selection of grand jurors.

Chief Justice Stone, Mr. Justice Black and Mr. Justice Murphy dissented from the majority opinion in the *Akins* case. In the dissenting opinion, written by Mr. Justice Murphy, it was said:

> "*Racial limitation no less than racial exclusion* in the formation of juries is an evil condemned by the equal protection clause. 'The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.' * * *" (Italics supplied.)

It is believed by petitioner that the dissenting Justices were not dissenting in any way from the majority opinion so far as the above language is concerned. It is believed that Mr. Justice Murphy, in the dissenting opinion, was merely re-stating a principle of law recognized by the majority of the Court in the *Akins* case. It was in the *application* of this principle that the dissenting Justices differed in opinion from the majority of the Court. The majority felt the principle should not be applied to "a single grand jury"; Justices Stone, Black and Murphy apparently felt that it should be so applied.

The Court of Appeals of Maryland, however, shows in its opinion a failure to understand the scope of the decision in the *Akins* case, and consequently has gone astray in applying fundamental constitutional principles to the facts of petitioner's case.

In the matter now before this Court, petitioner has shown "a course of conduct" resulting in discrimination; petitioner has shown a "continual" and "systematic exclusion of eligible jurymen of the proscribed race," and petitioner has shown an "unequal application of the law to such an extent as to show intentional discrimination," all proper

criteria in determining the presence *vel non* of discrimination, according to the *majority* opinion in the *Akins* case.

The Court of Appeals of Maryland, in its opinion, has made obscure the startling statistics which were proved by petitioner. Judge Henderson lays stress upon the number of Negroes selected by the Jury Clerk for the "list of 750." The so-called "list of 750" has absolutely no bearing on this case, under the evidence, because petitioner proved that in every instance within the scope of available records of the Supreme Bench grand jurors have been selected only from the so-called "list of 50 names," composed of the personal nominations of the various judges. The true picture, as it should be viewed by this Court, is that from the year 1910 in Baltimore City, there have been 108 grand juries with one Negro member each, and 2 grand juries with two Negro members each. Whatever the process which produces such a result, the result nevertheless *prima facie* shows discrimination.

Further, the Court of Appeals of Maryland has seen fit to superimpose upon the decisions of this Court an additional test for finding evidence of discrimination. Judge Henderson says:

> "In the absence of proof of a long continued and *invariable* practice, the fact that only one Negro served on the particular jury is without significance. *Akins v. Texas, supra.*" (Italics supplied.)

This Court has never required the showing of an "invariable" practice as a necessary element of proof. On the contrary, in *Smith* v. *Texas, supra,* Justice Black, in expressing the unanimous opinion of this Court, specifically noted, in reversing the conviction:

> "• • • that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none."

POOR COPY

BLEED THROUGH

Surely, the above pattern is not "invariable." If it is, then the pattern followed by the Supreme Bench of Baltimore City for more than 36 years is egregious constancy exemplified.

The Court of Appeals of Maryland, in its opinion, apparently in an effort to bring this case within the theory of the *Akins* case, says:

> "• • • Mr. Folger's (the Jury Clerk) testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two negroes who were excused from serving. *The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years.* If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946." (Italics supplied.)

To apply the false logic of the Court of Appeals of Maryland to the case of *Smith* v. *Texas, supra,* would require a finding that the pattern there shown was broken in several instances, hence no discrimination could be found. In other words, the only ***invariable*** pattern which this Court could have found in the *Smith* case would have been for the years 1937 and 1938, when there were consistently no Negroes selected for grand jury service. And, following the chain of logic to its conclusion, had this Court so found, there would have been no reversal in the *Smith* case, for there would have been no proof of a "systematic" and "continual" exclusion. Instead, the case would have fallen within the theory later expounded by this Court in *Akins* v. *Texas, supra.*

It should be noted further that the Court of Appeals of Maryland found a change *in the method* of selection of grand juries in Baltimore City *despite* the testimony of Chief Judge W. Conwell Smith, who testified (Tr. 47-48; R. 13); "The *method* of selecting a Grand Jury has been the same ever since I have been a member of the Bench. I came on the Bench in 1938. * * *", and *despite* the testimony of Associate Judge J. Abner Sayler, who has been a member of the Bench since 1937: "Frankly, Grand Juries since I have been here, have been selected in one manner and I know of nothing unusual about the selection of that (May Term, 1946) Grand Jury." (Tr. 141; R. 36)

It is true that Chief Judge Smith was allowed by the Court to testify again after having been given the opportunity of reviewing all the testimony at the hearing up until that time. When Judge Smith reappeared as a witness, he testified, using a prepared, written statement, as follows:

> "* * * While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced. * * *" (Tr. 169; R. 45)

However, at no place in the record, including Judge Smith's testimony, is a change in the "use" of the method shown. Counsel for petitioner attempted to obtain definite proof of such a change, if any, but was prevented from doing so by the trial court (Tr. 140, 158; R. 35, 42), which nevertheless found such a change, despite the direct statements to the contrary by present members of the Bench. The trial court refused to consider the fact that for 36⅔ years in the City of Baltimore there have been 108 grand juries with one Negro member each, 2 grand juries with

POOR COPY

BLEED THROUGH

two Negro members each, and no grand juries with no Negro members, but instead restricted its consideration to grand juries since 1944, 1945 and *since 1946*, the year in which petitioner was indicted, on the apparent theory that at some unspecified time in 1944 or 1945 a *change* in the method of selecting grand juries occurred. The trial court obviously based its finding of a change in method on the vague, indefinite and irrelevant evidence that, since the appointment of a new Chief Judge (Smith) of the Supreme Bench in 1945, the Bench holds weekly luncheon meetings (Tr. 186; R. 7), out of which has grown "a close, intimate relationship" (Tr. 187; R. 8) among the members of the Bench, and at which various problems, including the method of selecting jurors, are *discussed* (Tr. 186; R. 7).

Among other reasons cited by the trial court as indicating the change in the method of selecting grand jurors is the fact that the Supreme Bench has "taken an interest in the condition of the Court House so that there is presently to be placed before the public a loan for the reconstruction and modernization of the Court House." (Tr. 187; R. 7)

The trial court says in its oral opinion (Tr. 187; R. 8):

> "Now (1947), we are attempting to broaden the base out of which the whole jury list is made in order to bring in many persons who have not heretofore served. • • • That is a task which cannot be done in one day. We are working on it and a special committee of Judges is moving toward an increase in the basic lists not only as to any group but as to all citizens of Baltimore who are competent and able to serve, whether it be on a petit or Grand Juries. • • •"

The Court of Appeals of Maryland, however, chooses to rely on grounds other than the vague and obscure statements as to "weekly luncheon meetings" and improvements in the Court House in finding a change in the method of

selecting grand jurors. The Court of Appeals says (Tr. 203; R. 73):

> "• • • The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946."

In the record appears the unrebutted testimony of two present judges of the Supreme Bench that the method used for the selection of grand jurors in 1937 and 1938 has been the *same* ever since, yet the Court of Appeals finds that the method "is clearly not the same method".

II

Petitioner, by showing a long-continued and systematic limitation of the number of Negroes selected for grand jury service in the City of Baltimore, made a prima facie showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

The Court of Appeals of Maryland held that petitioner "failed to meet the burden of establishing a deliberate and intentional limitation on account of race or color, in the selection of the Grand Jury which indicted him, and that the finding of the trial court was supported by the weight of the evidence." (Tr. 206; R. 75).

Petitioner, on the other hand, respectfully maintains that a *prima facie* showing of unconstitutional racial discrimination has been made.

Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 84;

POOR COPY
BLEED THROUGH

Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567.

For 36⅔ years—from 1910 up to and including the grand jury for the May term, 1946—one Negro has served on each of 108 grand juries, while two Negroes have served on each of 2 grand juries. It is undisputed that Negroes constitute about 19% of Baltimore's total population of nearly a million persons, so that it can hardly be said that there has been a lack of qualified Negro eligibles for jury service. Nor did the State attempt to account on such a basis for the limited number of Negro grand jurors. Chief Judge Smith, on the contrary, testified (Tr. 52; R. 16):

> "• • • I regard it as a pure coincidence that the number of colored men on the Jury has most usually been restricted to one member. • • •"

The Court of Appeals, however, justifies its decision in part on the unavailability of qualified Negroes, a position never adopted by the judges of the Supreme Bench who testified at the hearing on petitioner's motion. As a matter of fact, such a position would be and is extremely difficult to explain, for it was testified that on every list of nominations for the grand jury there were from four to eight Negroes (Tr. 40; R. 12). Yet, regardless of the varying number of Negroes nominated on the lists of names, in 36⅔ years there were only two occasions when the ratio of 22 whites to one Negro was departed from, and then only to the extent of making the ratio 21 to 2. It is a matter of common knowledge that since 1910 the Negro—especially the urban Negro—has made great strides economically and educationally. The ups and downs in employment, times of war and peace, changes in population—none has had an effect on the number of Negroes selected for grand jury service in Baltimore.

Judge Henderson, in speaking for the Court of Appeals, goes to great length to set forth the findings of Judge Chesnut, sitting in the District Court, in the case of *U. S. ex rel. Jackson* v. *Brady*, D. C. 1942, 47 F. Supp. 362, where the question considered was whether there had been a systematic exclusion of eligible Negroes from the *petit juries* in Baltimore. Judge Henderson fails to note in his opinion, however, that, in the very same case, Judge Soper, speaking for the United States Circuit Court of Appeals, Fourth Circuit, said with regard to the *grand jury* in Baltimore (133 F. 2nd 476):

> "• • • *Except as to the Grand Jury*, whose organization was not challenged in this case, no discrimination can be found, • • •." (Italics supplied).

There can be no inference drawn from the facts as disclosed by the record in this case other than that a discriminatory course of conduct has been followed by officials charged with the selection of grand jurors in the City of Baltimore. As was said by this Court in *Hill* v. *Texas*, *supra*:

> "• • • Had there been evidence obtainable to contradict the inference to be drawn from this testimony, the state would not have refrained from introducing it, • • •."

In the present case, not only did the State refrain from introducing any contradictory evidence, but *counsel for petitioner* was prevented from asking questions which would have adduced such contradictory evidence, if any there had been (Tr. 140, 158; R. 35, 42).

The State of Maryland, at the hearing on petitioner's motion, made no explanation of the limitation of Negroes as shown by the evidence. The only rebuttal by the State consisted of the general statements by the Judges that no discrimination was intended. This, however, is insufficient

POOR COPY

BLEED THROUGH

to rebut the inescapable conclusions to be reached from the facts disclosed by the record.

> "• • • That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by *mere generalities.* If, in the presence of such testimony as defendant adduced, *the mere general assertions by officials of their performance of duty* were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. • • •" (Italics supplied) *Norris* v. *Alabama, supra,* p. 598.

We respectfully suggest that the impact of this record on a bench of the dignity of the Supreme Bench of Baltimore City would have brought forth specific and decisive proof of that point of time when, the manner in which, and the extent to which that bench had departed from a previous policy of limitation and discrimination, if in fact such evidence existed.

The conclusion is inescapable that there was no such proof available. Certainly it does not appear in the self-contradictory generalities of Chief Judge Smith. He first testified that the method of grand jury selection had been the same, to his knowledge, since 1938. After full opportunity to study the written record, and surely sensing the implications there contained, his written statement made at the time of his voluntary return to the stand offers no fact of any change in policy, purpose, or method. To say that the method was the same, but the use to which it was put was changed, and somewhat different results produced, is meaningless without further substantial specification. In the light of the proffered testimony of the four former judges, whose service on the Supreme Bench spanned more than 23 years (and continued up into 1945 in the case of

Judge O'Dunne), there can be no doubt that a deliberate policy of discrimination had been followed. This was clear to the Court of Appeals, who acknowledged it to be so, at least up to 1944. And yet the Court of Appeals was able to find evidence of a change of method in 1945 and 1946, without assistance from those most likely to know what change, if any, had actually taken place. Judge Sherbow, in the Criminal Court, certainly would have known the time, circumstances and extent of any change. Judge Sherbow did not hesitate to direct and lead the questioning of witnesses; yet he did not—we believe because he could not—direct attention to such a change. But there is more. If such an important change of policy had taken place, every judge of the Supreme Bench would have been fully aware of it, and the State could have conducted a parade of eleven judges to the witness stand to say when, where and how the system had changed. The two who did testify (C. J. Smith and Judge Sayler) affirmed the method as being without change.

Counsel for petitioner then attempted to assume, for the sake of clarity and certainty, a burden which clearly was that of the State. He attempted to ask another judge (Judge Emory H. Niles), who was called by the State, if there actually had been a change in policy or method since he, Judge Niles, had been on the bench (since 1938). The trial court refused to permit the witness to answer. This question and other similar ones, asked Judge Niles and Judge Sayler, and the trial court's rulings thereon, are considered more fully under Point III of this brief, *post*. They are referred to here as part of the complete failure by the State to rebut the long record of discrimination appearing from the affirmative proof.

The fact of two Negros on two juries in 1945 proves nothing, unless it is a slight change in the degree of discrimination. To change from a limit of one to a ceiling

POOR COPY

BLEED THROUGH

of two cannot, standing alone, erase 36 years of steadfast adherence to a policy of proscription. The silence of the bench, and the refusal by the trial court to permit the bench to be questioned on this point of particularity, stands as eloquent conviction that in fact no real, substantial and meritorious change had taken place.

III

Petitioner's rights were prejudiced by the Trial Court's rulings on evidence at the hearing on petitioner's motion to quash the indictment against him.

In the course of the hearing on petitioner's motion to quash the indictment, counsel for petitioner proffered the testimony of Judge Samuel K. Dennis, who was Chief Judge of the Supreme Bench from August, 1928, until August, 1944; the testimony of Judge Eugene O'Dunne, a member of the Supreme Bench from 1926 until 1945; the testimony of Judge Eli Frank, who served on the Supreme Bench from 1922 to 1944, and the testimony of Judge Duke Bond, who was a member of the Bench from 1922 to 1938 (Tr. 129-138; R. 30-35), all of whom retired from the Bench because of attainment of the constitutional age limit. All of these former judges were present in the courtroom at the time their testimony was offered (Tr. 138; R. 34).

With reference to Judge Dennis' testimony, counsel offered to show "that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted and deliberate practice of the Supreme Bench accepting as its final selection as the colored mem-

ber of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. * * *" (Tr. 135-136; R. 33).

Counsel offered to prove substantially the same facts by the testimony of the other ex-Judges for the periods during which they were members of the Supreme Bench (Tr. 136; R. 33).

The further offer was made to prove by the testimony of Judges Frank and Bond that on occasions they "suggested that there be a change in the method of selecting the colored members of the Grand Jury, particularly as to the number, and that the suggestion did not meet any favorable response on the part of the other members of the Bench." (Tr. 136; R. 33-34)

Counsel for petitioner further offered to prove by Judge O'Dunne that "on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice." (Tr. 136-137; R. 34)

In sustaining the State's objection to this testimony, the trial judge and (Tr. 132; R. 31):

> "* * * In explanation of the Court's sustaining the objection, I again call your attention to the fact that whatever may have been the practice prior to 1946, if that same system obtained in the May term, 1946, selection, then of course you could show a tradition and custom. But if that practice has changed after 1944, 1945, and in 1946 was not the custom that had existed prior thereto, then the testimony of Judge Dennis and the other members of the Bench who have retired, would have no application to this particular case."

POOR COPY

BLEED THROUGH

At this point in the proceedings, *no evidence whatsoever* had been adduced to show that the practice as to the selection of Grand Jurors had "changed after 1944, 1945," but on the contrary Judge Smith had testified unequivocally that "the method of selecting a Grand Jury has been *the same* ever since I have been a member of the Bench. I came on the Bench in 1938," (Tr. 47-48; R. 13) and there was no evidence presented subsequent to this ruling by the trial court to show that the system for selecting grand jurors was changed prior to May, 1946, when the grand jury which indicted petitioner was selected. On the contrary, Judge Sayler, a member of the Supreme Bench since 1937, later testified (Tr. 141; R. 36), "Frankly, Grand Juries since I have been here, have been selected *in one manner* and I know of nothing unusual about the selection of that (May, 1946) Grand Jury." The testimony of Judges Dennis, Frank, Bond, and O'Dunne was re-offered after Judge Sayler had testified and again the offer was refused by the Court (Tr. 142; R. 36).

It is earnestly maintained by petitioner that the trial court committed error—error highly prejudicial to petitioner's rights—when it refused to allow the ex-Judges to testify on both occasions when their testimony was offered. Nor is the prejudicial error cured by the statement of the Court of Appeals that "For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted." (Tr. 203; R. 73) The Court of Appeals failed to note that Judge O'Dunne was a member of the Bench in *1945* (Tr. 136; R. 33), when the Court of Appeals finds that a change took place in the method of selecting jurors. Obviously his testimony would have been of the utmost importance.

Counsel for petitioner specifically asked Judge Sayler, a present member of the Bench: "• • • I would like

to ask you whether or not since you became a member of the Supreme Bench there has been any change in the method of the selection of the Grand Jury or the colored member thereof?" (Tr. 140; R. 35), but, upon objection, the trial court refused to allow the question.

Again, counsel for petitioner inquired of Judge Niles, a present member of the Bench: "Has there been any change in the practice of selecting Grand Juries particularly with respect to colored members thereon since you became a member of the Supreme Bench?" (Tr. 158; R. 42) Upon objection, the trial court again refused to allow the question, the answer to which would have certainly disclosed a change, if in fact any such change had occurred.

Petitioner, further is unable to comprehend the relevancy, if any, of the questions propounded by and the statements made by the trial court concerning the selection of Grand Juries *after* May, 1946, when the Grand Jury which indicted petitioner was selected.

On pages 64 and 65 of the Transcript (R. 19-20), the trial court related from the Bench how he and the Chief Judge attempted to obtain a colored man to serve on a grand jury. This was *subsequent* to the May term, 1946.

Again, the trial court asked Judge Sayler: "Have you taken unto yourself the naming of the colored members of the Grand Juries *since* May, 1946 to the exclusion of the other members of the Bench in their selection?" (Tr. 141; R. 36)

On page 150 of the Transcript (R. 39), Judge Niles is asked by Judge Sherbow: "What is the practice of the Supreme Bench in May, 1946, *and since* with respect to excusing persons from service on the Grand Jury if they find it too burdensome?"

On page 152 of the Transcript (R. 39), the court asks Judge Niles: "To what extent have you personally made

POOR COPY

BLEED THROUGH

nominations of members of the negro race for service on the Grand Jury *since* 1946?"

Again, on page 154 of the Transcript (R. 40-41), Judge Niles is asked by the court: "Do you know of any custom *since* 1946 by which one particular member of the Supreme Bench, who has been called in these proceedings the Republican member, makes the selection of the Grand Jurors who are members of the negro race?"

The Court of Appeals, despite the fact that the impropriety and irrelevancy of each of the above questions was called to its attention in brief and argument, makes no mention of such questions in its opinion.

The prejudice to petitioner in these erroneous rulings on evidence is so manifest as to require no further comment.

IV

The grand jury which indicted petitioner was not selected in accordance with the methods prescribed for the selection of grand juries by the charter and public local laws of Baltimore City.

The evidence shows that grand juries have not been selected in accordance with the provisions of the Baltimore City Charter, *supra*. Selections for the grand jury have been made not from the list of 750 names, but invariably from a list of about fifty names chosen and compiled in a manner quite different from that in which the names of petit jurors are selected and compiled. And, after the 23 grand jurors have been selected, the names remaining on the fifty-name list are not inscribed upon ballots and placed in a drawing wheel for possible selection as petit jurors. Yet the Court of Appeals finds that there has been a "substantial compliance" with the statutory provisions, although admitting that "the practice has departed somewhat from the procedure outlined in the Statute."

The Charter expressly provides by Section 709 (pp. 405-406) that the provisions relating to the selection of jurors are to "be construed as directory merely," and that no indictment shall be quashed because of any failure to comply with such provisions. Nor does petitioner seek to have the indictment against him quashed solely because of non-compliance with the Charter provisions. It is petitioner's contention that the failure to comply with the Charter provisions has been one of the factors permitting and contributing to the discrimination against Negroes which obviously has occurred. Although non-compliance with the Charter provisions in itself may not warrant the quashing of an indictment, discrimination against members of the Negro race in the selection of grand juries resulting, if only in part, from such non-compliance not only warrants but *requires* the quashing of an indictment found by one of such juries.

V

Conclusion

Discrimination *has* entered into the selection of grand jurors in Baltimore City. Petitioner has no means except through the testimony of the members (and ex-members) of the Supreme Bench, to ascertain the details of transactions occurring within the privacy of the Supreme Bench conference room, but petitioner has proved, nevertheless, by facts and testimony, that the number of Negro grand jurors has in fact been systematically limited. The system which has existed in the City of Baltimore, and the results produced by such system, cannot be satisfactorily explained or defended. This Court has denounced similar systems and similar results in many instances.

The guilt or innocence of petitioner should not and must not be allowed to interfere with or influence a decision in this case as to whether there has been a denial of Federal constitutional rights. No court is "at liberty to grant or

POOR COPY

BLEED THROUGH

withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. * * * Equal protection of the laws is something more than an absolute right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least-deserving as well as the most virtuous." *Hill* v. *Texas, supra.* As was pointed out in the *Hill* case, a prisoner whose conviction is reversed need not go free, if he is in fact guilty, for the State may indict and try him again by a procedure which conforms to constitutional requirements.

To require petitioner to spend the remainder of his life in the penitentiary as a result of judicial processes so obviously saturated by discrimination against members of his race is clearly a denial to him of the equal protection to which he is entitled under the Fourteenth Amendment. The fundamental theories of our democratic form of government necessitate that this Negro, as a citizen of this country, shall not be deprived of his rights by a discriminatory procedure which leaves in its trail a record, so replete with unanswered questions, unexplained facts, undeniable implications, and numerous judicial errors and inconsistencies.

It is respectfully submitted that this case, involving as it does the serious claim that petitioner has been denied the equal protection of the laws, calls for the exercise by this Honorable Court of its supervisory powers to the end that rights guaranteed under the Federal Constitution shall be respected and preserved.

J. Cookman Boyd, Jr.,
Henry M. Decker, Jr.,
Attorneys for Petitioner.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 14 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~118 Misc.~~ 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION

HALL HAMMOND,
Attorney General,
RICHARD W. CASE,
Asst. Attorney General,
Attorneys for Respondent,
1901 O'Sullivan Building,
Baltimore 2, Maryland.

Of Counsel:
HARRISON L. WINTER,
Asst. Attorney General,
1901 O'Sullivan Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

POOR COPY

BLEED THROUGH

INDEX

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of Facts	3
Argument:	
I. The Record in This Case Fails to Substantiate Petitioner's Claims That Negroes Were Systematically and Intentionally Excluded from the Grand Jury which Indicted Him in Violation of The Fourteenth Amendment to the Federal Constitution and the Decisions of This Court	9
II. The Petitioner Failed to Make a Prima Facie Showing of Unconstitutional Racial Discrimination in the Selection of The Grand Jury which Indicted Him	14
III. The Petitioner's Rights Were Not Prejudiced by the Trial Court's Rulings on the Evidence	15
IV. The Grand Jury which Indicted the Petitioner was Selected in Accordance with the Methods Prescribed for the Selection of Grand Juries by the Charter and Public Local Laws of Baltimore City	16
Conclusion	17

Table of Citations

Cases

	PAGE
Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692 (1945)	9, 10, 11, 12, 13, 14, 15
Bush v. Kentucky, 107 U. S. 110, 27 L. Ed. 354 (1882)	9
Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839 (1900)	9
Cooper v. State, 64 Md. 40 (1885)	9
Fay v. New York, 322 U. S. 261, 91 L. Ed. 2043 (1947)	9, 15
Hale v. Kentucky, 303 U. S. 613, 82 L. Ed. 1050 (1938)	9
Hill v. Texas, 316 U. S. 400, 86 L. Ed. 1559 (1942)	9, 11, 12, 13
Hollins v. Oklahoma, 295 U. S. 394, 79 L. Ed. 1500 (1935)	9
Jackson v. State, 180 Md. 658 (1942)	10
Lee v. State, 163 Md. 56 (1932)	9, 10
Lee v. State, 164 Md. 550 (1933); Cert. den. 290 U. S. 639 (1933)	10
Moore v. New York, ... U. S. ....., 92 L. Ed. 637 (1948)	9, 11, 12, 15
Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567 (1881)	9
Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074 (1935)	9, 13
Patton v. Mississippi, 322 U. S. 463, 92 L. Ed. 164 (1947)	9, 13
Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 757 (1939)	9, 12, 13
Rogers v. Alabama, 192 U. S. 226, 48 L. Ed. 417 (1903)	9

POOR COPY

BLEED THROUGH

PAGE

Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84 (1940) 9, 10, 11, 13

Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1879) 9

United States ex rel. Jackson v. Brady, 47 F. Supp. 362 (D. Md., 1942) 6, 10, 12, 14

U. S. ex rel. Jackson v. Brady, 133 F. (2d) 476 (C.C.A. 4th, 1943), cert. den. 319 U. S. 746 (1943) 6, 10, 12

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 (1879) 9

Zimmerman v. State of Maryland, ... Md. ....., 59 A. (2d) 675 (1948) 1

Statutes

Charter and Public Local Laws of Baltimore City (1938 Ed.), Sections 687, 689 and 694 16

Federal Constitution, Fourteenth Amendment 9

28 U.S.C.A., Sec. 344(b) 2

POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 118 MISC.

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 59 A. 2d 675, at pages 194-206 of the Transcript of Record, and at pages 67-75 of the printed Record.*

* The term "Transcript of Record" refers to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "Record" and the symbol "R" cover the printed portions of the Record as filed by Petitioner and Respondent in the Court of Appeals of Maryland, and the Opinion of that Court, and submitted herewith to each of the Justices of this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was entered on June 16, 1948 (R. 67). The petition for a Writ of Certiorari was filed on September 13, 1948. The jurisdiction of this Court is invoked under the provisions of Section 1(b) of the Act of February 13, 1925 (Section 237(b) of the Judicial Code; 28 U.S.C.A., sec. 344(b)).

QUESTIONS PRESENTED

I.

Whether the trial and conviction of the petitioner was upon an indictment found and returned by a grand jury on which Negro members had been excluded solely on account of race or color, pursuant to an established systematic and continuous practice, in denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II.

Whether the petitioner showed a long continued and systematic exclusion of Negroes selected for grand jury service in the City of Baltimore and thus made a prima facie showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

III.

Whether the rights of the petitioner were prejudiced by the trial court's rulings on evidence produced at the hearing on petitioner's motion to quash the indictment against him?

POOR COPY

BLEED THROUGH

IV.

Whether the grand jury which indicted the petitioner was selected in accordance with the methods prescribed for the selection of grand juries by the Charter and Public Local Laws of Baltimore City.

STATEMENT OF FACTS

The petitioner was indicted by the May Term, 1946, Grand Jury of Baltimore City for murder and he was arraigned and pleaded not guilty. After his plea, petitioner asked leave of the lower court to withdraw his plea of not guilty and moved to quash the indictment on the ground that the grand jury was not selected in accordance with the requirements of the Charter and Public Local Laws of Baltimore City and that the indictment conflicted with the provisions of the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution and their counterparts in the Constitution of the State of Maryland. The lower court struck out the plea of not guilty and a hearing was held on the petitioner's motion to quash, at the conclusion of which the petitioner's motion was overruled. Thereafter, the petitioner again plead not guilty, was found guilty of murder in the first degree and sentenced to life imprisonment; he appealed to the Court of Appeals of Maryland, which affirmed the judgment of the lower court.

The selection of grand juries in the City of Baltimore is made before each term of the Criminal Court by the unanimous vote of the members of the Supreme Bench. This selection may be made from two sources, i.e. (1) from a list of seven hundred and fifty (750) names drawn from the jury service file which is prepared in the office of the jury clerk, and (2) from a secondary list of grand jury

nominations made by the individual members of the Supreme Bench.

The first step in selecting grand juries in Baltimore City is the preparation of the jury service file. This file consists of the names of sixteen thousand (16,000) persons, more or less, who are residents of the City. In preparing the jury service file, the jury clerk makes a list of prospective jurors by taking names from tax lists, voting lists, the criss-cross telephone book, the automobile book and the city directory (R. 56). Persons thus selected are sent "pink slips" through the mails which fix a time and place for the holding of an examination before the jury judge for the purpose of determining the qualifications as jurors of such persons. If such qualifications are found to exist, special cards are made out for the candidates in question which contain all pertinent information relative to the prospective jurors (R. 57). The candidates then become members of the jury service file.

Prior to the commencement of each term of criminal court, the jury clerk is required to forward to the Supreme Bench a list of seven hundred and fifty (750) persons from the jury service file (R. 45). This list usually contains the names of fifty (50) Negroes. The selection of the grand jury is then made by the Supreme Bench from that list of names "which is augmented by a list of suggestions made by the various judges" (R. 15, 16).

The list of suggestions made by the various judges referred to above begins with a list of persons known by or recommended to the individual members of the Supreme Bench, such persons being deemed by the judges as qualified for grand jury service. Every judge may make suggestions of anywhere from two to fifteen names, the result being a composite list which varies from forty-two (42) to

POOR COPY

BLEED THROUGH

sixty-two (62) names (R. 62). The number of Negroes on this composite list may vary from four (4) to eight (8) persons (R. 62). These Negroes are selected by different members of the Supreme Bench (R. 54).

Each judge, after assembling his grand jury nominations, forwards the list to the Chief Judge who, in turn, sends the list to the jury clerk. The jury clerk checks each name on the list for the purpose of determining the age, occupation, residence, race, prior jury service and all other relative information concerning the grand jury candidates (in many cases this information is obtained from the jury service file). After he has collected all of the above described information, the jury clerk tabulates his findings opposite the names of each grand jury candidate on a new list which is prepared in his office.

The list of grand jury nominations made by the judges together with the list of seven hundred and fifty (750) names prepared from the jury service file are turned over by the jury clerk to the clerk of the Supreme Bench. Upon the receipt of those two lists, the clerk of the Supreme Bench inserts all of the names in the "Supreme Bench of Baltimore City Jury Book". At the same time the clerk draws a certification to be signed by the judges which will indicate the names of persons qualified to serve as grand and petit jurors. Thereafter, the "Supreme Bench of Baltimore City Jury Book" together with the certification are taken to the judges consultation room.

After the "Supreme Bench of Baltimore City Jury Book" and the list of judges' nominations for grand jury service are deposited in the Supreme Bench consultation room, the grand jury is selected by the unanimous action of all of the judges. In selecting the grand jury there is no stereotyped course of procedure within the consultation room, the meet-

ing being open to "a free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury" (R. 55). When the judges have agreed on 23 names, the clerk of the Supreme Bench is called to the consultation room and given a list of those names, signed by the judges, which list ultimately constitutes the grand jury. The clerk retypes the list, and sends copies thereof to the Sheriff's office and to the jury clerk's office.

In some cases, a grand jury is unable to organize because one or more persons theretofore selected to serve have been excused. It then becomes necessary to hold a special meeting of the Supreme Bench to fill the vacancies thus occasioned. In such instances, persons of the Negro race have been telephoned for the purpose of determining whether they are available for jury service (R. 54).

In 1942 the method by which grand and petit juries were selected in the City of Baltimore was challenged in the United States District Court for the District of Maryland, *United States ex rel Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md. 1942). The contention in that case was that Negroes had been systematically, arbitrarily or intentionally excluded from both grand and petit jury service. The District Court did not rule specifically on the method by which grand juries had been selected, but did find that the petit juries had not been selected in violation of the mandates of the equal protection clause of the 14th Amendment to the Federal Constitution. In 1943 this decision was affirmed on appeal, *United States ex rel Jackson v. Brady*, 133 F. (2d) 476 (C.C.A. 4th, 1943), and certiorari was denied by this Court, 319 U. S. 746 (1943).

Late in 1944, the judges of the Supreme Bench took several steps to improve the method of selecting grand and petit juries for the City of Baltimore. One important step

POOR COPY

BLEED THROUGH

taken by the Bench was the inauguration of a Thursday luncheon meeting which is attended by all of the judges. At these meetings the selection and composition of grand and petit juries is discussed, the participation of Negroes in jury service being one of the topics (R. 46). In addition, the judges of the Supreme Bench have done the following things in regard to jury selection and service (R. 47):

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended the increase of the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of judges to study the jury system, and make recommendations looking to:

(a) Broadening the representative character of the basic jury list, and

(b) Improvement in the method of selecting persons for jury service.

Eleven Negroes have been picked to serve on the grand juries in Baltimore City, which have been drawn since the inauguration of the improved method of selecting such juries as outlined above. Of this number, two have been excused from jury service, while nine Negroes have actually served (R. 47).

The petitioner was indicted by the May Term, 1946, Grand Jury. Chief Judge Smith was the jury judge during 1946 (R. 51).

The May Term, 1946, Grand Jury was selected by the members of the Supreme Bench from (a) a list of seven hundred and fifty names supplied to the Bench by the jury clerk, and (b) the nominations of the individual Judges for grand jury service. The list of seven hundred and fifty names contained the names of approximately fifty Negroes. Prior to 1944, the list of seven hundred and fifty names contained the names of approximately twenty-five Negroes. Since 1944, this list has contained the names of approximately fifty Negroes (R. 22). The nominations made by the individual judges of the Supreme Bench for Jury service in the selection of the May Term, 1946, Grand Jury contained the names of six Negroes (R. 52).

Of the twenty-six persons selected to serve on the Grand Jury for the May Term, 1946, three were Negroes (R. 65). As originally selected by the members of the Supreme Bench, the May Term, 1946, Grand Jury contained two members of the Negro race. These gentlemen could not serve and were voluntarily excused (R. 64-65).

A special meeting of the Supreme Bench was held for the purpose of filling the vacancies caused by the fact that the two Negroes originally selected to serve on the Grand Jury (and one white man) had been excused. The three substitutions, which were "not made specifically one person for another" (R. 65) contained the name of one colored man.

The petitioner offered the testimony of a former Chief Judge of the Supreme Bench of Baltimore City and three former associate judges of the Supreme Bench to show the method of selecting grand juries prior to 1944. In the lower court, this testimony was refused to be admitted. The Court of Appeals, however, treated the testimony as

POOR COPY

BLEED THROUGH

having been admitted and found that it had no probative value to show unconstitutional discrimination in the selection of the grand jury which indicted the petitioner even if it were assumed that it showed such discrimination in the selection of grand juries prior to 1944.

ARGUMENT

I.

THE RECORD IN THIS CASE FAILS TO SUBSTANTIATE PETITIONER'S CLAIMS THAT NEGROES WERE SYSTEMATICALLY AND INTENTIONALLY EXCLUDED FROM THE GRAND JURY WHICH INDICTED HIM IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND THE DECISIONS OF THIS COURT.

The Court of Appeals of Maryland has never failed to recognize the binding force of the decisions of this Court in *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1879); *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879); *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1881); *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882); *Carter v. Texas*, 177 U. S. 442, 44 L. Ed. 839 (1900); *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Rogers v. Alabama*, 192 U. S. 226, 48 L. Ed. 417 (1903); *Hollins v. Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939); *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84 (1940); *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559 (1942); *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945); *Patton v. Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164 (1947); *Fay v. New York*, 332 U. S. 261, 91 L. Ed. 2043 (1947); *Moore v. New York*, ... U. S. ....., 92 L. Ed. 637 (1948). Exclusive of the case at bar, it has on four occasions considered contentions similar or identical to those made in the case at bar, *Cooper v. State*, 64 Md. 40 (1885); *Lee v. State*, 163 Md. 56 (1932);

Lee v. State, 164 Md. 550 (1933); *cert. den.* 290 U. S. 639 (1933) and *Jackson v. State,* 180 Md. 658 (1942). And in the first *Lee* case (163 Md. 56), where it found that the trial judge, in drawing a petit jury in Baltimore County, had systematically, intentionally or arbitrarily excluded Negroes from the panel because of their race, the Court of Appeals did not hesitate in reversing the conviction. Moreover, the method by which grand and petit juries are selected in the City of Baltimore was challenged unsuccessfully in 1942 in *U. S. ex rel. Jackson v. Brady,* 47 F. Supp. 362 (D. Md., 1942) and the findings by the District Court that Negroes under the method then in use had not been systematically, arbitrarily or intentionally excluded from petit jury service was affirmed on appeal in *U. S. ex rel. Jackson v. Brady,* 133 F. (2d) 476 (C.C.A. 4th, 1943), *cert. denied,* 319 U. S. 746 (1943).

The petitioner contends, however, that the method of selecting grand juries in Baltimore City, which has been changed since 1944 so as to permit a greater number of Negroes to serve than theretofore, is in violation of the Fourteenth Amendment to the Federal Constitution. This contention is based upon the Petitioner's interpretation of the opinion of this Court in *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940) and *Akins v. Texas,* 325 U. S. 398, 89 L. Ed. 1692 (1945). While the petitioner argues broadly that the test to be applied, in determining whether or not the May Term, 1946, Grand Jury in Baltimore City was selected in contravention of the petitioner's constitutional rights, is whether there was limitation on the number of Negroes and not whether there was a systematic, arbitrary exclusion of or discrimination against Negroes, he is forced to the conclusion, even from the consideration of the *Smith* case alone, that the test to be applied is that of discrimination against Negroes in the selection of grand juries and

POOR COPY

BLEED THROUGH

not merely limitation or exclusion of Negroes. That such must be his conclusion is dictated by all of the decisions of this Court prior to *Smith v. Texas, supra,* and *Hill v. Texas, supra,* and two of the more recent decisions of this Court in *Akins v. Texas, supra,* and *Moore v. New York, supra.*

In the *Akins* case, although the defendant contended that the equal protection clause of the Federal Constitution guaranteed to him not only the right to have Negroes considered as prospective jurors, but also the right to have them considered without numerical or proportional limitation, the majority of this Court rejected the argument and stated at 325 U. S. 398, 404:

> "* * * the mere fact of an inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proved by a systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination."

And in *Moore v. New York, supra,* where it appeared that a blue ribbon jury was selected from one hundred and fifty names drawn from the jury panel under the supervision of a Justice of the State Supreme Court and that there were no Negroes on the jury list as drawn, this Court in sustaining the indictment against the argument that the systematic limitation on the number of Negroes on a jury panel was sufficient to vitiate the proceedings, said:

> "It is admitted that on this panel of one hundred and fifty there was no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion — the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. * * * The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty."

The petitioner attempts to limit the language and the scope of the decision in *Akins v. Texas, supra,* on the ground that the grand jury selected there was but the second grand jury selected after the decision in *Hill v. Texas, supra,* and that, therefore, there was no possibility of showing a continual and systematic, discriminatory exclusion or practice in the selection of that jury. The grand jury considered in *Akins v. Texas, supra,* is analogous to the grand jury which indicted the petitioner. The method of selecting both grand juries and petit juries in Baltimore City was considered in *U. S. ex rel. Jackson v. Brady, supra;* and although in those cases that method was found to be immune to constitutional attack, the record is clear that the method of selecting grand jurors in Baltimore City since the decision in those cases has been materially altered. Such was the finding of the trial court and the Court of Appeals of Maryland, and although it is not suggested that their findings in the last analysis are binding on this Court where the question of a denial of a constitutional right is concerned, yet, as pointed out in *Akins v. Texas, supra,* and *Pierre v. Louisiana, supra,* the findings of the State courts in this respect are entitled to great weight and are highly persuasive of the result to be reached in this Court. Moreover, the petitioner's interpretation of the *Akins* case, *supra,* completely ignores the decision of this Court in the *Moore* case, *supra,* where the factors relied on by the petitioner to limit the scope of the *Akins* case were not present.

Although the situation in the instant case is analogous on its fact to the *Akins* case and to the result reached there, because a different method of selecting grand juries had been employed since 1944 and no discrimination since that date has been shown, the petitioner tries to bring the instant case within the scope of the general statements contained in the majority opinion in that case in his conclu-

POOR COPY

BLEED THROUGH

sion that the petitioner's constitutional rights were violated. His repeated references to the practice concerning the selection of grand juries since 1910 do not accomplish that result because in the *Akins* case the fact of change in the method of selecting grand juries in compliance with the mandate of this Court in *Smith v. Texas, supra,* and *Hill v. Texas, supra,* was held to make evidence of the method of selecting grand juries prior thereto without legal significance. Nor is his argument meritorious that the Court of Appeals in its use of the word "invariable" adopted a more stringent test to determine if the petitioner's constitutional rights had been violated than that adopted by this Court in the *Akins* case. It is clear from the opinion of the Court of Appeals that the test it used was invariable "systematic exclusion" and not a test of an invariable number of Negroes on grand juries, although it clearly recognized, in deference to the holdings of this Court in *Smith v. Texas, supra, Hill v. Texas, supra, Norris v. Alabama, supra, Pierre v. Louisiana, supra,* and *Patton v. Mississippi, supra,* that evidence of an invariable practice may in itself show systematic exclusion.

In an effort to escape the effect of the decision of the *Akins* case and the conclusion that the Court of Appeals correctly decided the petitioner's case, the petitioner attacks the findings of the trial court and the Court of Appeals to the effect that (a) the method of selecting grand juries in Baltimore City was changed in 1944 and (b) that no evidence of discrimination in the selection of grand juries since that date was produced. As a basis for his attack, petitioner places complete reliance on the fact that from 1910 to 1944 each grand jury in Baltimore City contained only one Negro member. Attention is drawn (a) to certain testimony of one associate judge of the Supreme Bench of Baltimore City which petitioner believes is vague and

inconclusive and (b) to one statement of the Chief Judge of the Supreme Bench of Baltimore City which was later amplified. The petitioner attempts to minimize the undisputed fact that since 1944 a conscious and purposeful attempt has been made to broaden the base from which juries, both grand and petit, are selected. Moreover, it is undisputed that in the year 1945 each of two grand juries contained two Negro members and of the twenty-six persons drawn for the grand jury which indicted the petitioner three were Negroes, two of whom asked to be excused from jury service, and one actually served. Thus, experience since 1944 demonstrates that in fact a change in the selection of grand juries has taken place.

It is submitted that the petitioner has failed to point to any facts in the record which, under the holdings of this Court, show that any of his constitutional rights were violated in the selection of the grand jury which indicted him.

II.

THE PETITIONER FAILED TO MAKE A PRIMA FACIE SHOWING OF UNCONSTITUTIONAL RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY WHICH INDICTED HIM.

The petitioner's contention that he made out a prima facie case of unconstitutional racial discrimination in the selection of grand juries in Baltimore City, which the State failed to rebut, is grounded solely on facts occurring prior to 1944. Even in 1944, Judge Chesnut in *U. S. ex rel. Jackson v. Brady, supra,* held that similar contentions were without foundation in fact. Since the change in method of selecting grand juries since 1944 such facts are without probative value to establish that there was systematic, intentional or arbitrary exclusion of Negroes from the May Term, 1946, Grand Jury which indicted the petitioner, *Akins v. Texas, supra.*

POOR COPY

BLEED THROUGH

The petitioner's comparision of the number of Negroes in the population of Baltimore City and the number of Negroes which have served on grand juries in Baltimore City proves nothing, *Akins v. Texas, supra, Fay v. New York, supra, Moore v. New York, supra.*

III.

THE PETITIONER'S RIGHTS WERE NOT PREJUDICED BY THE TRIAL COURT'S RULINGS ON THE EVIDENCE.

The petitioner complains because the trial court refused to permit the testimony of several former members of the Supreme Bench of Baltimore City with respect to the selection of grand juries in Baltimore City from 1922 to 1944. When the admission of this testimony was refused, petitioner's counsel, in accordance with the Maryland practice, made a proffer of what he proposed to prove. Although the trial court, in making its findings, did not refer to the evidence which the petitioner sought to introduce, the Court of Appeals in reviewing the case *treated all of the proffered evidence as having been admitted.* Nevertheless, the Court of Appeals found that such evidence was not sufficient to show a systematic discrimination against Negroes serving on grand juries in Baltimore City because of their color when it was considered that (a) on the January Term, 1945, Grand Jury, two Negroes were certified as members and both served, that (b) on the September Term, 1945, Grand Jury, two Negroes were certified as members and both served and that (c) on the grand jury which indicted the petitioner three Negroes were certified to serve, two of which voluntarily asked to be excused and one of which actually served. It is submitted that in this respect the petitioner's contentions are without merit.

IV.

THE GRAND JURY WHICH INDICTED THE PETITIONER WAS SELECTED IN ACCORDANCE WITH THE METHODS PRESCRIBED FOR THE SELECTION OF GRAND JURIES BY THE CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY.

The petitioner contends that grand juries in Baltimore City have not been selected in accordance with Sections 687, 689 and 694 of the Charter and Public Local Laws of Baltimore City (1938 Edition), and he contends that the failure to comply with these provisions has permitted and contributed to discrimination against Negroes serving on grand juries in Baltimore City. It is sufficient to say that the Court of Appeals found that the grand jury which indicted the petitioner was selected in accordance with the statute and that such a ruling, involving as it does purely the construction of a State statute, is one which this Court has on many occasions held that it will not review. Similarly, the petitioner's contention that, under the construction of the statute adopted by the Court of Appeals, discrimination may occur is one which has no substance. The petitioner has not shown that discrimination in fact did occur and that obviously is the only issue before this Court.

POOR COPY

CONCLUSION

The decision of the court below is correct. It conflicts in no way with any of the decisions of this Court, nor does it present any new or novel question. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HALL HAMMOND,
Attorney General,

RICHARD W. CASE,
Asst. Attorney General,
Attorneys for Respondent,
1901 O'Sullivan Building,
Baltimore 2, Maryland.

Of Counsel:

HARRISON L. WINTER,
Asst. Attorney General,
1901 O'Sullivan Building,
Baltimore 2, Maryland.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 5 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 429

SAM ZIMMERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

HALL HAMMOND,
Attorney General,
RICHARD W. CASE,
Asst. Attorney General,
1901 O'Sullivan Bldg.,
Baltimore, Maryland,
For Respondent.

The Daily Record Co., Baltimore 1, Md.

POOR COPY

INDEX

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	2
Statement of the Case	3
Summary of Argument	10
Argument:	
I. The mere fact that the Grand Jury which indicted Petitioner (the May Term, 1946 Grand Jury of Baltimore City) contained but one Negro Member, does not constitute grounds for quashing the indictment returned against Petitioner	11
II. The Facts in this case do not prove that the Supreme Bench of Baltimore City discriminated against Negroes in the selection of the May Term, 1946 Grand Jury	19
III. The Rulings made by the Criminal Court of Baltimore City at the hearing on Petitioner's Motion to Quash the Indictment do not constitute grounds for reversing the decision of the Court of Appeals of Maryland	39
IV. The Method prescribed for the selection of Grand Juries by the Charter and Public Local Laws of Baltimore City is valid and constitutional and does not afford grounds for quashing the indictment found against the Petitioner	44
Conclusion	47

Table of Citations

Cases

PAGE

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692 (1945) 10, 16, 19, 22, 28, 29, 30, 45
Bush v. Kentucky, 107 U. S. 110, 27 L. Ed. 354 (1882) 14, 26
Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839 (1900) 14, 19
Cooper v. State, 64 Md. 40, 20 A. 986 (1885) 25, 26
Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043 (1947) 27, 46
Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. Ed. 1232 (1932) 45
Hale v. Kentucky, 303 U. S. 613, 82 L. Ed. 1050 (1938) 15, 17, 21, 42
Herbert v. Louisiana, 272 U. S. 312, 81 L. Ed. 271 (1926) 45
Hill v. Texas, 316 U. S. 400, 86 L. Ed. 1559 (1942) 28, 29, 30, 31, 32, 33
Hollins v. Oklahoma, 295 U. S. 394, 79 L. Ed. 1500 (1935) 15
Jackson v. State, 180 Md. 658, 26 A. 2d 815 (1942) 27, 37
Lee v. State, 163 Md. 56, 161 A. 284 (1932) 26, 27, 38
Lee vs. State, 164 Md. 550, 165 A. 614 (1933), Cert. den. 290 U. S. 639 (1933) 27
McCandless v. United States, 298 U. S. 342, 80 L. Ed. 1205 (1936) 40
Moore v. New York, 333 U. S. 565, 92 L. Ed. 637 (1948) 16, 17, 46
Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567 (1881) .. 14
Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074 (1935) 15, 21, 27
Patton v. Mississippi, 322 U. S. 463, 92 L. Ed. 164 (1947) 17
Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 757 (1939) 15, 21, 27
Rogers v. Alabama, 192 U. S. 226, 48 L. Ed. 417 (1903) 14

POOR COPY

BLEED THROUGH

PAGE

Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84 (1940) 30, 31, 33, 46
Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1879) 12, 13
Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572 (1903) 14
United Gas Co. v. Texas, 303 U. S. 123, 82 L. Ed. 702 (1938) 45
United States ex rel. Jackson v. Brady, 47 Fed. Supp. 362 (D. Md., 1942) 7, 24, 37
United States ex rel. Jackson v. Brady, 133 F. (2d) 476 (C. C. A. 4th, 1943) 8
United States ex rel. Jackson v. Brady, cert, den. 319 U. S. 746 (1943) 8
Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880) 12
Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 (1879) 12, 13, 14, 19, 26

Statutes

Federal Constitution, 5th, 6th & 14th Amendments 2, 12, 13
Maryland Constitution, Article I, Sec. 6 4
Maryland Constitution, Article IV, Sec. 3 4
Maryland Constitution, Article IV, Sec. 19 4
8 U. S. C. A., Sec. 44, 18 Stats. 336 12
28 U. S. C. A. 391, 40 Stats. 1181 40
28 U. S. C. A., Sec. 1257 2

Miscellaneous

24 Am. Jur., Grand Juries, Sec. 27 12
Baltimore City Charter & Public Local Laws, Secs. 687-709 (1938) 2, 44, 45

POOR COPY

BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1948

No. 429

SAM ZIMMERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 59 A. (2d) 675, at pages 194-206 of the Transcript of Record, and at pages 67-75 of the printed Record.[1]

[1] The term "Transcript of Record" and the symbol "Tr." refer to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "record" and the Symbol "R" cover the printed portions of the Record as filed by Petitioner and Respondent in the Court of Appeals of Maryland, and the Opinion of that Court, and submitted herewith to each of the Justices of this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland to be reviewed in this case was entered on June 16, 1948. The Petition for a Writ of Certiorari was filed in this Court on September 13, 1948. This Petition was granted on November 22, 1948, and the case was placed on the summary docket as Case No. 429. The jurisdiction of this Court was and is invoked under the provisions of Section 1257 of the Act of September 1, 1948 (Section 1257) of the Judicial Code; 28 U. S. C. A., Sec. 1257.

STATEMENT OF THE CASE

On September 5, 1946, an indictment was filed against Sam Zimmerman, a Negro (hereinafter referred to as the Petitioner) in the Criminal Court of Baltimore City which charged the Petitioner with murder. Thereafter, the Petitioner was arraigned and pleaded not guilty.

On December 18, 1946, the Petitioner requested permission from the trial court to withdraw his plea of not guilty and moved to quash the indictment. The grounds alleged in the motion to quash were (1) that the Grand Jury which returned the indictment against the Petitioner "was not selected in accordance with the requirements of the Charter and Public Local Laws of Baltimore City and particularly Sections 687 to 709, inclusive", and (2) that the indictment returned against the Petitioner conflicted with the provisions of the 5th, 6th and 14th Amendments to the Federal Constitution, the Constitution of the State of Maryland, and the laws of the State of Maryland.

The theory underlying Petitioner's motion to quash the indictment was that members of the Negro race "have been and are systematically and wilfully denied their fair representation on" grand juries in the City of Baltimore

POOR COPY

BLEED THROUGH

(including the Grand Jury which returned the indictment against the Petitioner); that Negroes are deliberately excluded from membership on such grand juries "on account of their race and color"; and that membership of the Negro race on such grand juries "is deliberately limited and prescribed by those persons who, under the law, are charged with the duty of proper selection thereof, to one negro member out of a total membership of twenty-three, and only to one negro member, no more and no less."[2]

On January 29, 1947, the Criminal Court of Baltimore City struck out the plea of not guilty which had theretofore been entered by the Petitioner. Thereafter, testimony was taken in open court on the Petitioner's motion to quash the indictment. On March 27, 1947, the Criminal Court of Baltimore City overruled the motion to quash.

On April 21, 1947, the Petitioner was found guilty of murder in the first degree, and, on December 5, 1947, the Petitioner was sentenced to life imprisonment in the Maryland State Penitentiary.

On December 15, 1947, the Petitioner entered an appeal to the Court of Appeals of Maryland. Thereafter, following a complete and full hearing, the Court of Appeals on June 16, 1948, affirmed the disposition of the case which had theretofore been made by the Criminal Court of Baltimore City.

The facts upon which the Petitioner bases his allegations of unconstitutional discrimination against Negroes in this case revolve around the method by which grand juries are selected in the City of Baltimore, Maryland. The selection of such juries in the City of Baltimore is made before each term of the Criminal Court by the unanimous

[2] See the Motion of Sam Zimmerman to quash the indictment returned against him (Tr. 7-8).

vote of the members of the Supreme Bench of Baltimore City.[3]

The Supreme Bench of Baltimore City is the collective name for the eleven nisi prius judges who compose the Eighth Judicial Circuit of the State of Maryland.[4] Each judge (or member of the Supreme Bench of Baltimore City) is an elected official of the State of Maryland, whose term runs for fifteen years.[5] Upon qualifying for office, each member of the Supreme Bench of Baltimore City is required to take an oath to the effect that he will, among other things, support the Constitution of the United States.[6] Members of the Supreme Bench rotate each year from the law courts to the equity courts and thence to the criminal courts. The jurisdiction of each of the judges of the Supreme Bench of Baltimore City is both original and intermediate appellate, with all appeals from their decisions being taken directly to the Court of Appeals of Maryland. Next to the members of the Court of Appeals themselves, the members of the Supreme Bench of Baltimore City are the highest judicial officers of the State of Maryland.[7]

As stated above, selection of the grand juries for the City of Baltimore is made by the members of the Supreme Bench of Baltimore City. This selection may be made from two sources, i.e. (1) from a list of seven hundred and fifty (750) names drawn from the jury service file which is prepared in the office of the jury clerk, and (2) from a secondary list of grand jury nominations made by

---

[3] There are three terms of the Criminal Court of Baltimore City each year, i.e. the January, May and September Terms.

[4] Constitution of Maryland, Article IV, Section 19.

[5] Constitution of Maryland, Article IV, Section 3.

[6] Constitution of Maryland, Article I, Section 6.

[7] This position is, of course, shared by the judges of the various circuits which are composed of the Counties of the State of Maryland.

POOR COPY

BLEED THROUGH

the individual members of the Supreme Bench of Baltimore City.

The first step in selecting grand juries in Baltimore City is the preparation of the jury service file. This file consists of the names of sixteen thousand (16,000) persons, more or less, who are residents of the City. In preparing the jury service file, the jury clerk makes a list of prospective jurors by taking names from tax lists, voting lists, the criss-cross telephone book, the automobile book and the city directory (R. 56). Persons thus selected are sent "pink slips" through the mails which fix a time and place for the holding of an examination before the jury judge for the purpose of determining the qualifications of such persons as jurors. If such qualifications are found to exist, special cards are made out for the candidates in question which contain all pertinent information relative to the prospective jurors (R. 57). The candidates then become members of the jury service file.

Prior to the commencement of each term of criminal court, the jury clerk is required to forward to the Supreme Bench of Baltimore City a list of seven hundred and fifty (750) persons from the jury service file (R. 45). This list usually contains the names of fifty (50) Negroes. The selection of the grand jury is then made by the Supreme Bench of Baltimore City from that list of names "which is augmented by a list of suggestions made by the various judges" (R. 15, 16).

The list of suggestions made by the various judges referred to above begins with a list of persons known by or recommended to the individual members of the Supreme Bench of Baltimore City, such persons being deemed by the judges as qualified for grand jury service. Every judge may make suggestions of anywhere from two to

fifteen names, the result being a composite list which varies from forty-two (42) to sixty-two (62) names (R. 62). The number of Negroes on this composite list may vary from four (4) to eight (8) persons (R. 62). These Negroes are selected by different members of the Supreme Bench of Baltimore City (R. 54).

Each judge, after assembling his grand jury nominations, forwards the list to the Chief Judge who, in turn, sends the list to the jury clerk. The jury clerk checks each name on the list for the purpose of determining the age, occupation, residence, race, prior jury service and all other relative information concerning the grand jury candidates (in many cases this information is obtained from the jury service file). After he has collected all of the above described information, the jury clerk tabulates his findings opposite the names of each grand jury candidate on a new list which is prepared in his office.

The list of grand jury nominations made by the judges, together with the list of seven hundred and fifty (750) names prepared from the jury service file, is turned over by the jury clerk to the clerk of the Supreme Bench of Baltimore City. Upon the receipt of those two lists, the clerk of the Supreme Bench of Baltimore City inserts all of the names in the "Supreme Bench of Baltimore City Jury Book". At the same time the clerk draws a certification to be signed by the judges which will indicate the names of persons qualified to serve as grand and petit jurors. Thereafter, the "Supreme Bench of Baltimore City Jury Book", together with the certification, are taken to the judges' consultation room.

After the "Supreme Bench of Baltimore City Jury Book" and the list of judges' nominations for grand jury service are deposited in the Supreme Bench of Baltimore City

POOR COPY

BLEED THROUGH

consultation room, the grand jury is selected by the unanimous action of all of the judges. In selecting the grand jury there is no stereotyped course of procedure within the consultation room, the meeting being open to a "free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury" (R. 55). When the judges have agreed on 23 names, the clerk of the Supreme Bench of Baltimore City is called to the consultation room and given a list of those names, signed by the judges, which list ultimately constitutes the grand jury. The clerk retypes the list, and sends copies thereof to the Sheriff's office and to the jury clerk's office.

In some cases, a grand jury is unable to organize because one or more persons theretofore selected to serve have been excused. It then becomes necessary to hold a special meeting of the Supreme Bench of Baltimore City to fill the vacancies so occasioned. In such instances, prospective jurors, including Negroes, have been telephoned for the purpose of determining whether they are available for jury service (R. 54).

In 1942 the method by which grand and petit juries were selected in the City of Baltimore was challenged in the United States District Court for the District of Maryland, *United States ex rel Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md. 1942). The contention in that case was that Negroes had been systematically, arbitrarily or intentionally excluded from both grand and petit jury service. The District Court did not rule specifically on the method by which grand juries had been selected, but did find that the petit juries had not been selected in violation of the mandates of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. In 1943 this decision was affirmed on appeal, *United States ex rel Jackson*

v. Brady, 133 F. (2d) 476 (C. C. A. 4th, 1943), and certiorari was denied by this Court, 319 U. S. 746 (1943).

Late in 1944, the judges of the Supreme Bench of Baltimore City took several steps to improve the method of selecting grand and petit juries for the City of Baltimore. One important step taken by the Bench was the inauguration of a Thursday luncheon meeting which is attended by all of the judges. At these meetings the selection and composition of grand and petit juries is discussed, the participation of Negroes in jury service being one of the topics (R. 46). In addition, the present judges of the Supreme Bench of Baltimore City since 1944 have done the following things in regard to jury selection and service (R. 47):

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended an increase in the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of judges to study the jury system, and to make recommendations looking to:

(a) Broadening the representative character of the basic jury list, and

(b) Improvement in the method of selecting persons for jury service.

Up to and including the May Term, 1946 Grand Jury nine Negroes have been picked to serve on the five grand juries in Baltimore City drawn since the inauguration of the improved method of selecting such juries as outlined above. Of this number, two have been excused from jury

POOR COPY

BLEED THROUGH

service, while seven Negroes have actually served (R. 47). (For figures since May 1946 to date, see footnote 15, *infra*.)

The Petitioner was indicted by the May Term, 1946 Grand Jury. Chief Judge Smith was the jury judge during 1946 (R. 51).

The May Term, 1946 Grand Jury was selected by the unanimous vote of all the members of the Supreme Bench from (1) a list of seven hundred and fifty names supplied to the Bench by the jury clerk, and (2) the nominations of the individual judges for grand jury service. The list of seven hundred and fifty names contained the names of approximately fifty Negroes. Prior to 1944, each list of seven hundred and fifty names customarily contained the names of approximately twenty-five Negroes. Since 1944, this list has contained the names of approximately fifty Negroes (R. 22). The nominations made by the individual judges of the Supreme Bench of Baltimore City for jury service in the selection of the May Term, 1946 Grand Jury contained the names of six Negroes (R. 52).

Of the twenty-three men originally selected to serve on the Grand Jury for the May Term, 1946, two were Negroes. Both of these men voluntarily asked to be excused, and were excused from jury service. Thereafter a special meeting of the Supreme Bench of Baltimore City was held for the purpose of filling the vacancies caused by the fact that the two Negroes originally selected to serve on the Grand Jury (and one white man) had been excused. The three substitutions, which were "not made specifically one person for another" (R. 65) contained the name of one colored man.

It thus appears that of the twenty-six men selected to serve on the Grand Jury for the May Term, 1946, three were Negroes.

SUMMARY OF ARGUMENT

This case raises the question of whether the nisi prius judges who collectively compose the Supreme Bench of Baltimore City discriminated against Negroes in the selection of the May Term, 1946 Grand Jury of the City of Baltimore—a Grand Jury which returned an indictment against the Petitioner for murder.

Only one Negro served on the May Term, 1946 Grand Jury. It is our position, however, that this fact, standing alone, does not constitute constitutional grounds for quashing the indictment found and returned against the Petitioner. We further contend that every fact contained in the record in this case, which bears directly upon the actual selection of the very Grand Jury involved in this proceeding, proves conclusively that that Grand Jury was fairly, honestly and constitutionally selected.

In an attempt to overcome the patent absence of actual racial discrimnation in the selection of the May Term, 1946 Grand Jury, the Petitioner relies upon the fact that from 1910 through 1944, each grand jury selected in the City of Baltimore contained but one Negro member. The record in this case clearly shows, however, that the unbroken series of "one Negro" grand juries in Baltimore City ended with the year 1944, and has never been resumed. We submit that the rationale of the decision of this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), makes the set pattern of grand juries in Baltimore City prior to 1944 not probative—either directly or indirectly—of the question whether the May Term, 1946 Grand Jury was the product of racial discrimination.

The Petitioner has asserted that the decision of the lower court should be reversed because the Criminal Court of

POOR COPY

BLEED THROUGH

Baltimore City refused to hear evidence of four retired members of the Supreme Bench of Baltimore City which related to the method by which grand juries were selected prior to 1944. A complete proffer of all of the testimony to be offered by these judges was made by counsel for Petitioner in the trial court, and the Court of Appeals of Maryland, in reaching its decision, considered that testimony as admitted into evidence. Since the Court of Appeals gave the Petitioner every possible benefit to be gained from this evidence, we submit that the rulings made by the trial court were non-prejudicial to the Petitioner and, as a result, the decision of the lower court should be affirmed.

The Petitioner has maintained that the provisions of the Charter and Public Local Laws of Baltimore City constitute one of the factors permitting and contributing to the discrimination against Negroes in the selection of grand juries. It is our position that this contention, when reduced to its lowest terms, amounts only to the point that the statutes in question offered an opportunity for discrimination against Negroes, and that that fact, without more, does not constitute constitutional grounds for quashing an indictment found against a Negro.

ARGUMENT

I.

THE MERE FACT THAT THE GRAND JURY WHICH INDICTED PETITIONER (THE MAY TERM, 1946 GRAND JURY OF BALTIMORE CITY) CONTAINED BUT ONE NEGRO MEMBER, DOES NOT CONSTITUTE GROUNDS FOR QUASHING THE INDICTMENT RETURNED AGAINST PETITIONER.

As ultimately constituted, the May Term, 1946 Grand Jury of the City of Baltimore contained but one Negro member (although two others who were originally selected requested to be, and were excused). At the outset of our

argument, therefore, we stress the principle that this fact, standing alone, does not present constitutional grounds for quashing the indictment returned against the Petitioner.[8] The Federal Constitution does not require that Negroes should be members of all grand juries which indict Negroes, the constitutional prohibition being only against the willful and intentional *discrimination* against Negroes in the selection of grand juries solely because of their race or color.[9]

Four years after the passage of 8 U. S. C. A. Sec. 44, this Court decided the leading cases of *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1879), and *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879). In each of these cases, it was clearly established that the presence of one Negro on a grand jury—and only one—or the presence of no Negroes on a grand jury would not, standing alone, constitute constitutional grounds for quash-

---

[8] In his motion to quash the indictment, the Petitioner contended that he had been deprived of his rights under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution. It is elementary, however, that nothing contained in the Fifth or Sixth Amendments applies to the case at bar since those Amendments have specific reference to Federal and not State action. In the great majority of cases dealing with discriminatory practices in the selection of grand juries, this Court has based its decisions on the equal protection clause of the Fourteenth Amendment. There is some authority, however, for the proposition that the due process clause of the Fourteenth Amendment is also applicable. 24 Am. Jur. *Grand Juries*, Sec. 27.

[9] The seriousness of this case is magnified by the shadow of 8 U.S.C.A., Sec. 44, 18 Stats. 336. This Act, which has been a guardian of civil rights for more than seventy-three years, provides that any person charged with the duty of selecting jurors who shall exclude or fail to summons any citizen on account of race, color or previous condition of servitude "shall on conviction thereof be deemed guilty of a misdemeanor, and be fined not more than $5,000". No question can now remain but that this Act is fully authorized by the Federal Constitution and that it is applicable to a nisi prius judge charged with the duty of selecting a grand jury. *Ex Parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1880).

POOR COPY

BLEED THROUGH

ing the indictment found against a Negro. For example, in the *Strauder* case, *supra*, this Court reached the conclusion that a State statute which limited jury service to "all white male persons" denied equal protection under the laws to Negroes as required by the Fourteenth Amendment to the Constitution. In reaching this result, this Court put the question for decision as follows, at page 305:

> "It is to be observed that the first of these questions is not whether a colored man, where an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 (1879), expanded the doctrine established by the *Strauder* case, *supra*, by holding that not only a State statute but also action by any State official which excluded Negroes from jury service would contravene the dictates of the Fourteenth Amendment. This Court pointed out, however, that a Negro would not necessarily be deprived of his civil rights by reason of the fact that no members of his race had been appointed to the grand jury which found the indictment against him. In this connection, this Court said at page 322:

> "It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. *A mixed jury in a par-*

> *ticular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute.* It is not, therefore, guaranteed by the 14th Amendment, or within the purview of section 641." (Italics supplied.)

No case decided by this Court since its decision in the *Rives* case, *supra*, has established the rule that the absence —or limitation—of Negroes from grand jury duty is of itself evidence of unconstitutional discrimination. Thus, in *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1881), this Court restated the general rule, as follows, at page 394:

> "We repeat what was said in that case, that while *a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws,* it *is* a right to which he is entitled, 'That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color'." (Italics supplied.)

Three years later, this Court enunciated somewhat the same rule in *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882). In that case, this Court observed at page 117:

> "There was no legal right in the accused, to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color.*"

Many later cases decided by this Court have dealt with the problem now under consideration. *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572 (1903); *Rogers v. Alabama*, 192 U. S. 226, 48 L. Ed. 417 (1903); *Carter v. Texas*, 177 U. S.

POOR COPY

BLEED THROUGH

442, 44 L. Ed. 839 (1900); *Hollins v. Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500 (1935); *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938). But in not one of these cases has this Court even implied that proof of the absence of all Negroes from one particular jury panel—or the limitation of Negroes from one particular jury panel—*without more*, was sufficient to require the indictment found and returned against a Negro to be quashed.[10]

---

[10] A recent case on this subject, *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939), illustrates the point that absence of Negroes from a particular grand jury is significant and decisive only if a continuous history of unbroken exclusion from juries has led up to that particular jury involved. In other words, discrimination is shown not by the absence from the jury involved of all Negroes, but by the fact that every jury in that jurisdiction for many years has lacked Negroes. In the *Pierre* case, it was proved that no Negroes had ever served on the grand or petit juries for the Parish in which the defendant had been indicted; that during this period only one Negro had been called for jury service; that a jury list of three hundred persons selected in December 1936 (the year in which the defendant was indicted) contained the names of only three Negroes (one of whom was dead); that of the total Parish population, 49.3% were Negroes. The facts further reveal that to qualify for jury service in Louisiana a person was required to be (1) a citizen of the State and a resident for at least two years in the Parish for which the jury was selected; (2) over twenty-one years of age; (3) able to read and write; (4) not charged with any offense, having no record of a felony conviction, and be of general good character and standing in the community. In ordering the indictment found against the defendant to be quashed, this Court said at pages 361-362:

> "The testimony introduced by petitioner on his motion to quash created a strong *prima facie* showing that negroes had been systematically excluded—because of race—from the Grand Jury and the venire from which it was selected. Such an exclusion is a denial of equal protection of the laws, contrary to the Federal Constitution—the supreme law of the land. 'The fact that the testimony * * * was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it."

That the mere absence of Negroes on a single grand jury or the mere limitation of Negroes on a single grand jury does not, standing alone, constitute grounds for quashing the indictment founded against a Negro has been reiterated by this Court in the recent case of *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945) and in the very recent decision of *Moore v. New York*, 333 U. S. 565, 92 L. Ed. 637 (1948).

In the *Akins* case, *supra*, the defendant, a Negro, was indicted, tried, found guilty of and sentenced for murder by the Criminal District Court of Dallas County, Texas. In his motion to quash the indictment found against him, the defendant alleged and proved that prior to June 1, 1942, no colored man had ever served on the grand jury in Dallas County. The facts also revealed that one Negro was placed on the grand jury list in October, 1942, but did not serve and that one Negro was placed on the grand jury list in 1943 who did serve. Before this Court, the defendant took the position that the equal protection clause guaranteed to him not only the right to have Negroes considered as prospective veniremen, but also the right to have them considered without numerical or proportional limitation. The majority of this Court rejected this premise and stated, as follows, at page 404:

> "Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, and Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164, all supra. *The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic*

POOR COPY

BLEED THROUGH

exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." (Italics supplied.)

The state of the law on this point is well summed up in an annotation to *Hale v. Kentucky, supra,* found in 82 L. Ed. at page 1061, wherein it is said:

> "The decisions of the United States Supreme Court holding a defendant entitled to indictment or trial by a jury from which members of his class or race have not been intentionally excluded appear to have created in some quarters the impression that, in order to constitute a valid jury, there must be on it some members of the defendant's class or race. This, of course, is an entirely erroneous impression, which the appellate courts, including the United States Supreme Court, have been quick to correct.
>
> "In a number of cases the courts have expressly pointed out that a defendant in a criminal case has no constitutional right to be indicted or tried by any particular jury, or by a jury composed in part of members of his race or class."

The most recent case in which this Court has dealt with the problem here under discussion is *Moore v. New York,* 333 U. S. 565, 92 L. Ed. 637 (1948).[11] In that case, it

---

[11] The only other recent case in which an opinion has been written by this Court relating to the instant problem is *Patton v. Mississippi,* 332 U. S. 463, 92 L. Ed. 164 (1947). In that case, this Court ordered an indictment found against a Negro to be quashed because the proof established an arbitrary and systematic exclusion of Negroes from jury service solely because of their race. This result was clearly justified since the defendant proved without contradiction that no Negroes had served on grand or petit juries in Lauderdale County for more than thirty years; that one Negro had been summoned for jury service during that period but had failed to appear; that two or three unidentified Negroes had been placed on the jury list during that

appeared that one hundred and fifty names were drawn from the jury panel under the supervision of a Justice of the State Supreme Court and that there were no Negroes on the jury list as drawn. This Court in sustaining the indictment against the argument that the systematic limitation of the number of Negroes on a jury panel was sufficient to vitiate the proceedings said, in part, at page 568:

> "It is admitted that on this panel of one hundred and fifty there were no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion—the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. * * * The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty."

From the above outline of the pertinent decisions of this Court, we submit that the following legal principles properly govern the case at bar:

1. The fact that Negroes are absent from a grand jury panel which indicted a Negro—or the fact that the number of Negroes was limited on a grand jury panel which indicted a Negro—*without more* does not constitute grounds for quashing the indictment.

2. Before an indictment found against a Negro should be quashed because of the absence of Negroes from the grand jury panel (or the limitation of Negroes from the grand jury panel) it must be proved that Negroes were intentionally, arbitrarily and systematically discriminated against in the selection of the particular grand jury in question solely because of their race.

---

period; that the total adult population in the County was thirty-four thousand, of which twelve thousand were Negroes; that several hundred Negroes were qualified to vote in the County; and that Negroes had served on Federal grand and petit juries for the District which included Lauderdale County.

POOR COPY

BLEED THROUGH

II.

THE FACTS IN THIS CASE DO NOT PROVE THAT THE SUPREME BENCH OF BALTIMORE CITY DISCRIMINATED AGAINST NEGROES IN THE SELECTION OF THE MAY TERM, 1946 GRAND JURY.

As we have pointed out, the mere fact that the May Term, 1946 Grand Jury (the Grand Jury which indicted the Petitioner) contained only one Negro member does not, of itself, constitute constitutional grounds for quashing the indictment found and returned against the Petitioner.

Therefore, does the record in the case at bar contain any other facts which prove clearly and conclusively that the Supreme Bench of Baltimore City discriminated against Negroes in the selection of the May Term 1946 Grand Jury.[12]

In his Brief, Petitioner seeks to establish racial discrimination in the selection of the May Term, 1946 Grand Jury by showing that from 1910 to 1944 each grand jury in Baltimore City had one and only one Negro member. It is of paramount significance, however, that at no point in his Brief does the Petitioner (nor can he) directly connect this historical analysis with the May Term, 1946 Grand Jury—the Grand Jury which indicted the Petitioner.[13]

---

[12] That the Petitioner in the case at bar must carry the burden of proving that Negroes were discriminated against in the selection of the Grand Jury which indicted him cannot now be subject to doubt. This principle was established by this Court in *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1897). In the later case of *Carter v. Texas*, 177 U. S. 442, 44 L. Ed. 839 (1900), this Court said at page 447:

> "The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the state, must be supported by evidence on the part of the defendant."

The same principle was reiterated in the recent decision of this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), in which this Court observed at page 400: "The burden is, of course, upon the defendant to establish the discrimination."

[13] The Petitioner's Brief is replete with general statements to the effect that from 1910 up to and including the May Term, 1946 Grand

We wish here to underline with the greatest of emphasis the point that the decision in this case turns on the issue of whether the judges of the Supreme Bench of Baltimore City actually discriminated against Negroes in the selection of the May Term, 1946 Grand Jury. In order that this pivotal question may be ascertained, we invite this Court's attention to the only facts in the record in this case which deal directly with the actual selection of the May Term, 1946 Grand Jury.

The record shows that the May Term, 1946 Grand Jury was selected from a composite list of names, including (1) a list of 750 names supplied to the Members of the Supreme Bench of Baltimore City by the jury clerk, and (2) certain nominations made by the individual judges for grand jury service. It further appears that the list of 750 names contained the names of approximately 50 Negroes, and that the nominations made by the individual judges of the Supreme Bench of Baltimore City for jury service contained the names of six Negroes.

In addition, the record in this case conclusively shows that of the 26 persons selected to serve on the May Term, 1946 Grand Jury, three were Negroes. Moreover, it appears that both of the Negroes originally selected to serve by the judges of the Supreme Bench of Baltimore for the May Term, 1946 Grand Jury requested to be excused from jury service and were excused. The voluntary action of those

---

Jury only one Negro had served on each of 108 grand juries, while two Negroes had served on each of two grand juries. See, for example, Brief of Petitioner, pages 16, 21. It is obvious, however, that such general statements tell only part of the story. For example, the Grand Jury which indicted the Petitioner—the May Term, 1946 Grand Jury—contained only one Negro member, but the facts further reveal that three Negroes in all were nominated to serve. If Negroes voluntarily elect not to serve on a particular grand jury after they have been nominated for such service, the fault cannot be that of the State. For further discussion of this matter, see footnote 15, ante.

POOR COPY

BLEED THROUGH

Negro candidates for jury service required the Supreme Bench of Baltimore City to hold a special meeting for the purpose of filling vacancies. At this meeting one additional Negro was selected to serve on the Grand Jury in question.

The facts as to the number of Negroes on the basic lists from which were selected the members of the May Term, 1946 Grand Jury, and as to the number actually selected, not only negative any inference that there was a discrimination, but indeed show affirmatively that there was not. Thus, the incontrovertible facts in the case show that in the selection of this particular Grand Jury there was no violation of the letter or the spirit of the Constitution of the United States under the interpretations of this Court in matters of this kind.

In an attempt to overcome the patent clarity of the absence of actual discrimination, Petitioner recites again and again that there was but one Negro member on each Grand Jury in Baltimore City from 1910 to 1944.[14] He seeks to draw around him the mantle of the doctrine that a consistent course of procedure in drawing juries is evidence of the way in which a particular jury was selected. We do not challenge that doctrine where the facts fit and the course of conduct has been consistent down to the occasion complained of. We do challenge the validity of its application to the facts of this case. Whatever had happened in the selection of juries from 1910 to 1944 ended for good with the coming of January 1, 1945. Petitioner's effort to

[14] In making the contention above we do not deny the general principle that evidence of a course of procedure in drawing juries may be offered to show the method by which a particular jury has been selected. This rule has clearly been established by the decisions of this Court. For example, see *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939).

use the "course of procedure" evidence fails because what *has* happened is probative of what *did* happen only if things are *now* as they were *then*. Petitioner not only attempts to overlook or gloss over an essential factual gap, but also attempts to explain away or ignores a basic legal concept flowing from the factual gap. The legal concept, where consistency of procedure has ended, is that adopted by this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), namely, that past practices of selecting grand juries will not be determinative of racial discrimination in the selection of a particular grand jury, if the record proves that those past practices have come to an end.

That the use of the method by which grand juries were selected in Baltimore City was changed late in 1944 by the members of the Supreme Bench is clearly sustained by (1) the record in this case, (2) the opinion of the trial court filed in this case, and (3) the opinion of the Court of Appeals of Maryland. These three sources will be discussed in the order listed here.

The record in the case at bar reveals that Chief Judge Smith, while testifying under oath, stated emphatically that while the procedural method of selecting grand juries had not changed, *"the use made by the Judges of the method has changed"*, and that *"different results have been produced"* (R. 45). In addition, Chief Judge Smith, after describing the advent of the luncheon meetings held each Thursday by all of the members of the Supreme Bench, observed that "during these meetings the selection and composition of the grand juries and petit juries and *the participation of Negroes in jury service* has been discussed" (R.46).

No evidence in the record of this case contradicts the sworn statements of the Chief Judge of the Supreme Bench

POOR COPY

which are outlined above. To the exact contrary, the record in this proceeding is replete with facts which are completely independent from but which support in every detail the testimony of the Chief Judge.

In this connection, we underline the following facts:

(1) On the January Term, 1945 Grand Jury two Negroes were certified as members and both served.

(2) On the September Term, 1945 Grand Jury, two Negroes were certified as members and both served.

(3) On the May Term, 1946 Grand Jury (which indicted the Petitioner), three Negroes were certified to serve; two *voluntarily* asked to be and were excused; and one Negro served.

(4) On the seven grand juries empaneled since 1945 (to the date of the hearing in the trial court) eleven Negroes were certified to serve as members and nine served.[15]

---

[15] In addition to the facts set forth in the text which are included in the record in this proceeding, we respectfully direct this Court's attention to the following matters which are not specifically in the record in this case, but which are a matter of public record in the Courts of the City of Baltimore, and are, therefore, subject to judicial notice.

1. On the September Term, 1946 Grand Jury, one Negro was certified as a member, and this Negro served.
2. On the January Term, 1947 Grand Jury, one Negro was certified as a member, and that Negro served.
3. On the May Term, 1947 Grand Jury, five Negroes were certified as members, and four served.
4. On the September Term, 1947 Grand Jury, three Negroes were certified as members, and three served.
5. On the January Term, 1948 Grand Jury, three Negroes were certified as members, and three served.
6. On the May Term, 1948 Grand Jury, four Negroes were certified as members, and none served.
7. On the September Term, 1948 Grand Jury, four Negroes were certified as members, and two served.

Certainly the statistics outlined above are conclusive on the fact that the use of the method in selecting grand juries in the City of

In addition to these facts, we call this Court's particular attention to the fact that Judge E. Paul Mason signed the order certifying the May Term, 1946 Grand Jury. Before ascending to the Bench, Judge Mason had served as counsel in the case of *United States ex rel. Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md., 1942). As we have already pointed out, the same argument advanced by the Petitioner here with respect to the selection of the May Term, 1946 Grand Jury was made by Judge Mason in the *Jackson* case with respect to petit juries in Baltimore City. It is inconceivable that Judge Mason would have condoned a practice in the case at bar which he so ably and skillfully condemned in the *Jackson* case.

Baltimore had been changed at the time the May Term, 1946 Grand Jury—the Grand Jury which indicted Petitioner—was drawn.

This Court will observe that no Negroes served on the May Term, 1948 Grand Jury. It is significant, we think, that this was the first Grand Jury in the City of Baltimore in the past thirty-eight years on which no Negroes served. In explanation of this fact, the following appears in the published charge of Judge Herman M. Moser to the Grand Jury, May Term, 1948, The Daily Record, Baltimore, Tuesday, May 11, 1948:

> "In the selection of this Grand Jury for the May Term, 1948, the Supreme Bench named four negroes in the list of Grand Jurors selected to serve.
>
> Grand Jurors must devote at least five mornings every week for a period of four months to their important work. In addition there are visits to penal institutions and other investigations to be made, in some instances requiring much additional time.
>
> Sometimes the Grand Jury is required to sit in the afternoons. Therefore, when it is a real hardship on the person chosen, the Court, for good cause shown, will excuse him or her.
>
> For this term of Court we have excused these persons because in each instance they were able to show the Court that service on the Grand Jury would have been extremely burdensome to them and, in many instances, would have meant the loss of their positions.
>
> This is the explanation for the fact that there are no Negroes on the Grand Jury, in spite of the fact that four were named by the Supreme Bench."

Based on this record, and as a participant in the process of selecting the grand jury in question, Judge Sherbow, in his opinion in the Criminal Court of Baltimore City, stated unqualifiedly that the Supreme Bench of Baltimore City "has sought to avoid both discrimination in the selection of Grand Jurors, and even the appearance of discrimination" (R. 7). And again, that "the Supreme Bench of Baltimore City is not discriminating against Negroes in the selection of Grand Jurors" (R. 8-9). More specifically, Judge Sherbow said, in rendering his oral opinion, that:

> "The evidence in the case dates from Judge Smith's first Grand Jury as Chief Judge, that is, since 1945. There has been no discrimination of any kind since that date. I am not dealing here with any charge that anybody may make as to Grand Juries selected prior to that time.
>
> "The evidence here shows no discrimination. The facts are clear, and, I think, demonstrate not that there was no Grand Jury in a long time that had more than one Negro, but on the contrary that in the past two years and a few months there have been three Grand Juries where two Negroes actually were named. The Supreme Bench is not responsible for the fact that the very Grand Jury that indicted Zimmerman had two persons named who were colored but who for personal reasons requested that they be excused from serving."

The entire record in this case was completely reviewed by the Court of Appeals of Maryland, a Court which has been recognized for generations as a fair, unbiased and completely impartial Court.[10] After making that review

---

[10] Although the precise point in the case at bar had never been decided by the Court of Appeals of Maryland, that Court has on several occasions been faced with related questions. For example, in *Cooper v. State*, 64 Md. 40, 20 A. 986 (1885), the specific questions were: (1) whether the lower court erred in refusing the defendant's application to strike out his plea of not guilty for the purpose of imposing

and after hearing extensive argument by counsel for the Petitioner and by counsel for the Respondent, the Court of Appeals stated unqualifiedly that "if a policy of limitation was followed before 1944 it was obviously discontinued in 1945."

---

a plea in abatement; (2) whether the lower court erred in refusing to permit the defendant to remove his case to the United States District Court on the theory that the laws of the State of Maryland applicable to the selection of grand and petit juries deprived the defendant (a Negro) of equal protection under the law. The Court of Appeals in rendering its decision in the *Cooper* case, *supra*, cited and relied upon decisions of this Court; principally the cases of *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 676 (1876); and *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882). In *Lee v. State*, 163 Md. 56, 161 A. 284 (1932), the question presented to the Court of Appeals of Maryland was whether a petit jury drawn in a criminal case was the product of racial discrimination. The facts showed that the jury was selected by the Judge of the Circuit Court for Baltimore County (which is not to be confused with the Criminal Court of Baltimore City, a separate and distinct tribunal); that the Judge had never selected a Negro for jury service; that the explanation for this exclusion was that the Judge did not consider Negroes at all, that he did not exclude them from consideration, but that he merely did not consider them. The Court of Appeals reviewed all of the decisions of this Court relating to racial discrimination in drawing juries and reached the conclusion that the jury in question was drawn in contravention of the Constitution and the decisions of this Court. In reversing the conviction and remanding the case for a new trial, the Court of Appeals stated at page 66:

> "But it has been strongly urged upon this court that the course of procedure followed, and the actual selections made by it throughout all the jury terms of the last twenty-six years, show an established practice or system in which no opening is left for members of the negro race to obtain places on juries, and that this amounts to exclusion in the constitutional sense. And there is no gainsaying that, in pursuing the method of noting down names of good men suggested to him in his daily routine, the judge has not taken down any but those of white men. His system of drawing jurors begins with a collection of names of white eligibles, and hence is confined from the beginning to the selection of white men. Only the white men appear to have been looked to for jurors. The evidence, with the long, unbroken absence of negroes from the juries selected, seems to show an established practice, confining selections to white men as effectually as if such a restriction were prescribed by statute. And the

POOR COPY

BLEED THROUGH

We most earnestly submit that the complete record in this case contains ample evidence to sustain the finding of the Court of Appeals of Maryland that the use of the method by which grand juries are selected in the City of Baltimore was changed in 1945. Certainly the unqualified statements made by Judge Sherbow to this effect cannot be overlooked, particularly in view of the fact that Judge Sherbow was a member of the Bench when the May Term, 1946 Grand Jury was selected, and actively participated in the selection of that Grand Jury. Moreover, the facts which we have hereinabove called to the attention of this Court, which are completely independent of the oral statements made by Chief Judge Smith and Judge Sherbow, sustain the position for which we contend. In view of the principle that the findings of the Court of Appeals of Maryland and the conclusion reached by it are entitled to great weight here, *Fay v. New York*, 332 U. S. 261, 272, 91 L. Ed. 2043 (1947); *Norris v. Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074 (1935); *Pierre v. Louisiana*, 306 U. S. 354, 358, 83

---

court has concluded that this, under the authorities, amounts to unconstitutional exclusion of negroes."

The *Lee* case, *supra*, reached the Court of Appeals again. *Lee v. State*, 164 Md. 550, 165 A. 614 (1933). On this appeal, the Court of Appeals of Maryland held that the error implicit in the drawing of the first petit jury had been subsequently cured. Subsequently, this Court denied certiorari, 290 U. S. 639 (1933). The most recent decision of the Court of Appeals of Maryland dealing with the question of racial discrimination in the drawing of petit juries is *Jackson v. State*, 180 Md. 658, 26 A. (2d) 815 (1942), in which the Court of Appeals held that the record contained no evidence on the selection of the jury in question.

Based on the following synopsis of the decisions of the Court of Appeals of Maryland which have dealt with racial discrimination in the drawing of juries, we submit it to be clear that that Court has, whenever the occasion required it, struck down as invalid a jury which had been selected in contravention of the Federal Constitution or the decisions of this Court. Certainly the Court of Appeals would have struck down the conviction in the case at bar on the authority of *Lee v. State, supra*, if it had felt that the facts in the present case justified a ruling similar to that reached there.

L. Ed. 757 (1939), we submit that this Court should find as a fact that the practice of selecting grand juries which had obtained in the City of Baltimore was changed in the year 1945.[17]

Because the practice of selecting grand juries in Baltimore City had been changed by 1945, and since the record in this case completely fails to establish that Negroes were discriminated against in the selection of the May Term, 1946 Grand Jury, we submit that this case may be decided on the basic philosophy implicit in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945). In the *Akins* case, as in the case at bar, a Negro, who had been indicted, tried, convicted and sentenced for the crime of murder, moved to quash the indictment found and returned against him on the grounds of racial discrimination in the selection of the grand jury. This discrimination was said to consist *of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one*, who was placed upon the grand jury panel of sixteen for the term of court at which the indictment against the Petitioner was found.

In support of his motion to quash, the defendant in the *Akins*, case, *supra*, proved that prior to June 1, 1942 (the date on which this Court decided the case of *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559 (1942) no colored man had ever served on a grand jury in the county in which the defendant had been indicted. The facts further revealed that one Negro had been placed on the October Term 1942 Grand Jury, but had not served, and that one Negro had

[17] Counsel for the Petitioner have obviously attempted to obtain from this Court a ruling on a new principle of law, i.e. whether the mere limitation of Negroes on a grand jury will constitute racial discrimination. In view of the fact that the practice of limiting Negroes on grand juries in the City of Baltimore had ceased before the May Term, 1946 Grand Jury was drawn, we submit that it is unnecessary to decide that question in the case at bar.

POOR COPY

BLEED THROUGH

been placed on the January Term, 1943 Grand Jury who had served. One of the jury commissioners testified that he "had no intention of *placing more than one negro on the panel*". He further stated that, "When we did that we had finished with the negro." And a second jury commissioner stated that "I did not have any intention *of putting more than one negro on the list;* I could not think of anybody; ** * * our intentions were to get just one negro on the Grand Jury.*"

This Court held that the evidence in the *Akins* case, *supra,* failed to establish the fact that the jury commissioners had systematically, intentionally or arbitrarily excluded Negroes from the Grand Jury which had indicted the defendant. In reaching this result, the Court said, at pages 403-404:

> "Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds'."

Certainly the facts outlined in the *Akins* decision make out an eminently stronger case for racial discrimination in the selection of grand juries than do the facts in the case at bar.

In the *Akins case,* no Negroes had ever served on a grand jury for the County in which the defendant was indicted until this Court decided the matter of *Hill v.*

Texas, supra. In the case at bar at least one Negro has always been a member of every grand jury for Baltimore City.

In the *Akins* case, a change of policy in selecting Negroes for grand jury service was installed after the decision of this Court in *Hill v. Texas, supra.* In the case at bar a change in the use of the method of selecting grand juries in Baltimore City has been employed since late in 1944. In both situations, the change was intended to secure larger Negro representation on grand juries.

In the *Akins* case, it clearly appeared that the jury commissioners intentionally and purposely limited the number of Negroes to one on the grand jury which indicted the defendant. In the case at bar, the exact opposite is true, the facts showing that there was no intentional, systematic or arbitrary limitation or exclusion of Negroes from the May Term, 1946 Grand Jury by the members of the Supreme Bench of Baltimore City. To the contrary, the facts in the case at bar show that of the twenty-six persons called for grand jury service for the May Term, 1946, three were Negroes; and that on the five grand juries beginning with the January Term, 1945, and down to the May Term, 1946 Grand Jury, nine Negroes have been selected to serve.

In his Brief, the Petitioner complains that the Court of Appeals of Maryland "failed to follow a long line of applicable decisions of this Court". Although a substantial list of cases is set out in his Brief to support this contention, Petitioner draws particular attention to the matter of *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940), and to the case of *Hill v. Texas,* 316 U. S. 400, 86 L. Ed. 1559 (1942). We submit that neither of these cases controls the case at bar.

In the *Smith* case, the evidence revealed that Negroes constituted twenty percent of the population of the district in which the defendant had been indicted; that ten

POOR COPY

BLEED THROUGH

percent thereof were poll-tax payers; that from 1931 to 1938 only five of three hundred and eighty-four grand jurors who served were Negroes; that of the five hundred and twelve persons summoned for grand jury duty only eighteen were Negroes; that of these eighteen, thirteen appeared as the last names on the list and, therefore, would not, as a practical matter, be called; that of the five Negroes who did serve, the same individual had served three times, so that only three individual Negroes served at all; that of thirty-two grand juries empanelled only five had Negro members while twenty-seven had none.

In quashing the indictment this Court said at pages 130-131:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list."

It appeared in *Hill v. Texas,* 316 U. S. 400, 86 L. Ed. 1559 (1942), that the defendant, a Negro was indicted for the crime of rape by the Grand Jury for Dallas County, Texas.

A motion to quash the indictment was filed on behalf of the defendant upon the ground "that negroes had been excluded from the Grand Jury which returned the indictment, and that the jury commissioners and other state officers charged with the duty of organizing and impanelling grand juries in Dallas County have for many years systematically excluded, and in this case did exclude, negroes from the grand jury because of their race." In support of this motion, it was proved that the jury commissioners (who assembled the grand jury in question) summoned white persons with whom they were acquainted and whom they knew were qualified; that the jury commissioners knew of no qualified Negroes who "would make a good grand juror"; that they "made no investigation or inquiry to ascertain whether there were Negroes in the county qualified for grand jury service."

The facts further revealed that a district attorney (later a judge) testified "that he never knew of a Negro being called to serve on a grand jury in the county". Qualified Negroes testified that they had lived in the County for from fifty-four to twenty-six years and that they had "never known of a Negro to be called on a grand jury." Additional statistical evidence was introduced which showed that there were sixty-six thousand poll taxpayers in the county, eight thousand of whom were Negroes; that only 7.5 percent. of the Negro population of the county were illiterate. In ordering the indictment to be quashed this Court said at page 404:

> "We think petitioner made out a prima facie case, which the State failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we pointed out in *Smith v. Texas, supra,* (311 U. S. 131), chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a

POOR COPY

BLEED THROUGH

period as sixteen years or more. The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by Section 4 of the Civil Rights Act of March 1, 1875, 8 U. S. C. A. sec. 44, and fully established since the decision in 1881 of *Neal v. Delaware*, 103 U. S. 370, *supra*—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether they are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service."

It is obvious, we submit, that both the *Smith* case and the *Hill* case, *supra*, dealt with situations in which a pattern of systematic and intentional racial discrimination had carried into and had been responsible for the very grand jury which indicted the defendants there involved. In neither case did the State show that the unlawful pattern had changed. In both cases the unchanged pattern was one of total exclusion, unless the half-hearted attempt to comply with the mandates of this Court in the *Smith* case, *supra*, can be dignified by the term "limitation".

In conclusion, a succinct summary of, first, the fatal weaknesses of the Petitioner's case and, second, the affirmative strengths of the Respondent's case, may help in correctly appraising the fundamental, basic and determinative issue before this Court, namely—was there present in the selec-

tion of the May Term, 1946 Grand Jury of Baltimore City actual, intentional discrimination against Negroes as such.

First:

1. Burden is admittedly on the Petitioner to convince this Court that there was actual and intentional discrimination in the selection of the May Term, 1946 Grand Jury of Baltimore City.

2. The facts bearing upon the actual selection of the May Term, 1946 Grand Jury show that that Grand Jury was constitutionally drawn. For example, Chief Judge Smith testified under oath that there was no discrimination implicit in the selection of the Grand Jury in question. Moreover, Judge Sherbow, in his opinion which may be taken as evidence in this case, stated emphatically that there had been no racial discrimination in the selection of the May Term, 1946 Grand Jury. In addition, the record shows that six Negroes were on the list of nominations made by the Judges of the Supreme Bench from which the May Term, 1946 Grand Jury was selected; that of the 26 men selected for jury service, three were Negroes; that two Negroes voluntarily asked to be excused from jury service and were excused; and that one Negro and one white man were selected in substitution for the two Negroes who had been excused.

3. Petitioner has produced no evidence of intentional discrimination against Negroes in the actual selection of the May Term, 1946 Grand Jury. To the contrary, the facts in the record show clearly that the May Term, 1946 Grand Jury was honestly, conscientiously and constitutionally drawn.

POOR COPY

Second:

1. In an attempt to overcome the fact that there is no evidence in this case showing discrimination against Negroes in the selection of the May Term, 1946 Grand Jury, Petitioner has proved only in this connection that each of the three grand juries in Baltimore City for each year beginning with 1910 and ending in 1944, had one Negro and none had more or less.

2. Petitioner's proof stops there, as it must, on the facts. The January Term, 1945 Grand Jury of Baltimore City had two Negroes, as did the September Grand Jury of that year. The Grand Jury immediately under consideration, that of May, 1946, had on it, as originally drawn, two Negroes, both of whom asked to be excused and for whom one Negro and one white man were eventually substituted. Thus, the unbroken chain of one-Negro grand juries which ran from 1910 to 1944 stopped in January, 1945.

3. Petitioner's effort to bridge the gap between 1944 and the May Term, 1946 Grand Jury by the proffer of the testimony of the ex-judges of the Supreme Bench of Baltimore City, does not help him. None of the judges served after 1944 except Judge O'Dunne, who served only until June, 1945. As far as Judge O'Dunne's proffered testimony is concerned, the record is plain that the January, 1945 Grand Jury originally had on it two Negroes. Nothing which he might have said could change this fact. Furthermore, there is no dispute that while the method of selecting Grand Juries has never changed (using the word "method" in the sense of mechanics of selection) it is clear that the use made of that method did change, beginning in 1945, as the figures show.

Third:

1. The State has proved in this case that the use of the method for selecting Grand Juries in the City of Baltimore which obtained from 1910 to 1944 had terminated as of January 1, 1945, and was not in operation at the time the May Term, 1946 Grand Jury was selected.

2. The first affirmative fact which sustains the Respondent's contention outlined above is the fact that the composition of the eleven man Supreme Bench changed materially in 1943 and 1944. The six new judges serving at the time of the selection of the May Term, 1946 Grand Jury were Judge Tucker who was appointed on June 18, 1943; Judge Moylan on September 11, 1943; Judge Sherbow on May 4, 1944; Judge Mason on October 17, 1944; Judge Moser on October 23, 1944; and Judge Manley on October 1, 1945. Judge W. Conwell Smith became Chief Judge of the Supreme Bench on September 1, 1944. Thus, the first grand jury selected under the chief judgeship of Judge Smith, and by the newly constituted Supreme Bench, namely, the January Term, 1945 Grand Jury, was the first in many years to contain two Negroes, and began the series of grand juries on which have served from none to five Negroes.

3. The sworn testimony of Judge W. Conwell Smith is to the fact that while the method of selecting Grand Juries has remained unchanged, the use to which that method has been put has changed since the beginning of 1945.

4. The testimony of Judge Emory H. Niles of the Supreme Bench shows that in April of 1946, he selected John L. Berry, a Negro, for service on the May Term

POOR COPY
BLEED THROUGH

Grand Jury. Mr. Berry was certified, but asked to be excused. Judge Niles further testified (Tr. 155): "In 1946 I have nominated two members of the colored race and would have nominated others if their names had been available to me and I had known them."

5. Judge E. Paul Mason of the Supreme Bench was counsel for the Petitioner in the case of *United States ex rel. Jackson v. Brady, supra*, in which the question of discrimination against Negroes on petit juries was the issue. The first grand jury selected by the Supreme Bench of Baltimore City after Judge Mason became a member was the January, 1945 Grand Jury, on which, for the first time since 1910, there appeared two members of the Negro race.

6. The re-constituted Bench, under a new Chief Judge, dating from the beginning of 1945, not only increased the number of colored men on the grand juries, but also ordered the removal of distinguishing marks after the names of colored jurors on both the grand and petit juries, and appointed a committee of judges to make recommendations looking to the broadening of the representative character of the jury list and improvement in the method of selecting jurors. In this study, the participation of Negroes was considered as one phase of the problem (R. 47, 48).

7. The opinion of Judge Sherbow, who sat on this case and who became a member of the Supreme Bench in 1944, is the equivalent of sworn testimony by him as to the facts at issue here. His statement is that the jury clerk is completely free from any bias and has exercised neither conscious nor unconscious discrimination against Negroes. He further said: "The

Grand Jury of May, 1946, which indicted Zimmerman, was fairly and properly chosen in accordance with the laws. No discrimination against Negroes in the naming of that Grand Jury, nor has there been any discrimination of any kind since I have been on the Bench."

8. The Court of Appeals of Maryland found as a fact, after considering all testimony which had been rejected as if in the record, that if there had been discrimination up to 1944, it ceased as of January 1, 1945. This is a court which has not hesitated to protect the righ's of Negroes. See the cases cited in footnote 16. In one of those cases, *Lee v. State, supra,* a conviction was set aside on the ground that racial discrimination was shown by a long course of conduct. Thus, the importance and significance of the court's finding in the instant case that there was no discrimination is made more impressive.

For the reasons set forth above, we most earnestly submit that the Court of Appeals of Maryland reached the correct conclusion in the case at bar, and that its decision should be affirmed.

POOR COPY

III.

THE RULINGS MADE BY THE CRIMINAL COURT OF BALTIMORE CITY AT THE HEARING ON PETITIONER'S MOTION TO QUASH THE INDICTMENT DO NOT CONSTITUTE GROUNDS FOR REVERSING THE DECISION OF THE COURT OF APPEALS OF MARYLAND.

In his Brief, the Petitioner maintains that a new trial should be granted in this case because of certain rulings on matters of evidence which were made by the Criminal Court of Baltimore City at the hearing on Petitioner's motion to quash. Petitioner's chief complaint in this direction is that the testimony of four retired members of the Supreme Bench, i.e. Judge Samuel K. Dennis, Judge Eugene O'Dunne, Judge Eli Frank and Judge Duke Bond, was not admitted into the record by the trial court. After the trial court had ruled on these matters, counsel for the Petitioner was permitted to make a complete and full tender of the facts which he sought to prove through the testimony of the four Judges named above. For the convenience of this Court, the entire tender made by counsel for the Petitioner is reproduced below.[18]

---

[18] The complete proffer is as follows (Tr. 135-137):

"Mr. Boyd: Your Honor, I tender to prove, based on the questions that I have already propounded and which have been denied, that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted, and deliberate practice of the Supreme Bench accepting as its final selection as the colored member of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. I also offer to prove substantially those exact facts by former Judge Eugene O'Dunne, serving from 1926 until

It requires no citation of authority, we submit, to sustain the general proposition that a ruling on a matter of evidence will not constitute grounds for setting aside a verdict and ordering a new trial unless upon the entire record it appears that the truth has not been reached. That this rule obtains in the Federal Courts is readily apparent, both from various Acts of Congress,[19] and from the decisions of this Court.[20] We maintain, therefore, that the Petitioner must affirmatively demonstrate from the record in these proceedings as an entirety that he has been denied some substantial right and has thus been prevented from having a fair trial by reason of the rulings made by the trial court on the evidence points in question before the decision of the lower court should be reversed.

Before the Court of Appeals of Maryland, the Petitioner most strenuously urged as one of the grounds for reversal the fact that the Criminal Court of Baltimore City had

---

1945, and by former Judge Eli Frank, who served from 1922 until 1943. I further offer to prove—

"Judge Frank: Until 1944.

"Mr. Boyd: Excuse me, until 1944. I further offer to prove by Judge Frank that on occasions he suggested that there be a change in the method of selecting the colored members of the Grand Jury, particularly as to the number, and that that suggestion did not meet any favorable response on the part of the other members of the Bench. I also offer to prove substantially the same facts by Judge Duke Bond, who was a member of the Supreme Bench—I don't remember when you were on.

"Judge Bond: 1922 to 1938.

"Mr. Boyd: 1922, to 1938. I further offer to prove by Judge O'Dunne that on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice."

[19] For example, see: Act of February 26, 1919, Chapter 48, 40 Stat. 1181, 28 U.S.C.A. 391.

[20] For example, see: *McCandless v. United States*, 298 U. S. 342, 80 L. Ed. 1205 (1936).

POOR COPY

BLEED THROUGH

erred in its rulings on the evidence which he sought to introduce by the four retired Judges. In opposition, counsel for the State maintained that the rulings made by the trial court on these points was non-prejudicial since the sum total of the tendered evidence utterly failed to establish the fact that the Supreme Bench of Baltimore City had discriminated against Negroes in the selection of the May Term, 1946 Grand Jury. After completely reviewing the record, the Court of Appeals of Maryland treated the evidence proffered by the Petitioner as though it had been admitted, and decided that the rulings made by the trial court were non-prejudicial and did not constitute grounds for reversal.[21] We submit that since the Court of Appeals of Maryland considered the full weight of Petitioner's tender, treated the evidence there proffered as admitted, and decided the case on the basis of that evidence, the Petitioner has been denied no substantial right by reason of the rulings in question.

This Court—like the Court of Appeals of Maryland—should, of course, consider the complete tender made by counsel for the Petitioner as part of the evidence in this

---

[21] On this precise point, the Court of Appeals of Maryland said:

"For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted. Mr. Folger's testimony that one, and only one, Negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two Negroes who were excused from serving. The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946."

case.[22] When such a consideration is undertaken, we submit that this Court will see—as the Court of Appeals saw—that the tender (a) has no direct bearing whatsoever on the actual selection of the May Term, 1946 Grand Jury; (b) deals only with the use of the method of selecting grand juries from 1910 to the latter part of 1944; and (c) does not attempt to disprove the fact that the use of the method of selecting grand juries in Baltimore City changed in the latter part of 1944 and in 1945.

In all probability, the precise ruling of the Criminal Court of Baltimore City on the evidentiary points under consideration was correct. But totally apart from any technical rules of evidence, the full weight of the proffered testimony was considered by the Court of Appeals and its decision was grounded upon that consideration. Based upon the entire record in the case at bar, therefore, we submit that no reversible error has been occasioned by the treatment by the Court of Appeals of the proffered testimony of the four retired members of the Supreme Bench of Baltimore City.

In addition to the matters discussed above, Petitioner has invited this Court's attention to various other miscellaneous rulings on evidence points made by the Criminal

[22] In addition to these demonstrable facts in relation to the proffer of the testimony of the ex-judges, it may be conceded that their testimony is in the case as if it had been given from the stand. The Court of Appeals so treated the proffer, and it is to be so treated here. There is precedent in this Court in a similar case for such a course of conduct. See *Hale v. Kentucky, supra.* There, a motion, essential to the determination of the case, was omitted from the record before the State Court of Appeals. In this Court the parties agreed that the motion might be read and considered as a proper part of the record, and the Attorney General of Kentucky disclaimed reliance upon the omission from the original record in the State court, since the motion had actually been brought to the attention of the Court of Appeals of the State. This Court decided the case on the record as thus informally made.

POOR COPY

BLEED THROUGH

Court of Baltimore City.[23] No precise grounds are stated in Petitioner's Brief for reversing the lower court because of those rulings. The inference may be drawn, however, that the Petitioner complains because the evidence there in question related to grand juries chosen subsequent to the date when the May Term, 1946 Grand Jury was selected.

We submit that the method by which grand juries have been selected in the City of Baltimore since 1946 is in some degree probative of the fact that the use of the method in selecting grand juries in the City of Baltimore had been changed by 1945. For example, such evidence would tend to substantiate the fact that the change was real, rather than illusory—one of substance rather than of form. Being relevant, therefore, we submit that the evidence was properly admitted for whatever value it might have had.

In conclusion, we submit that the decision of the Court of Appeals of Maryland should not be reversed by this Court on technical evidentiary points unless it is clearly apparent from the record as a whole that the Petitioner has failed to receive a fair trial on his motion to quash the indictment. That Petitioner received a fair and impartial hearing is obvious, not only from the remarks made by counsel for the Petitioner himself,[24] but also from a com-

---

[23] See particularly pages 28 and 29 of Petitioner's Brief.

[24] At the hearing, the trial court suggested to counsel for the Petitioner that a motion for disqualification might be filed by reason of the fact that the trial court had participated in selecting the May Term, 1946 Grand Jury. Counsel for the Petitioner stated emphatically that he did not desire to interpose such a motion. In this connection, the following interesting colloquy between the trial court and counsel for the Petitioner appears in the record (pp. 61-62):

> (The Court) Now, Mr. Boyd, I ask you whether or not you wish me to disqualify myself, having signed the very list that is involved in this case.

plete review of the record in the case at bar, both before the Criminal Court of Baltimore City and before the Court of Appeals of Maryland. For the reasons above stated, therefore, the decision of the lower court should be affirmed.

IV.

THE METHOD PRESCRIBED FOR THE SELECTION OF GRAND JURIES BY THE CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY IS VALID AND CONSTITUTIONAL AND DOES NOT AFFORD GROUNDS FOR QUASHING THE INDICTMENT FOUND AGAINST THE PETITIONER.

The final point which Petitioner urges as grounds for reversal in the case at bar is to the effect that the failure of the Supreme Bench to comply with the provisions of the Charter and Public Local Laws of Baltimore City in the selection of grand juries "has been one of the factors permitting and contributing to the discrimination against Negroes".[25] In making this argument, however, the Petitioner admits that non-compliance with the Charter pro-

---

(Mr. Boyd) The question having occurred to you, I think the answer could just as well. I haven't any desire to disqualify you. I am not afraid of any decision I shall get.

(The Court) I am being very particular as we take this case step by step to safeguard every right this traverser has. The man I have never seen and do not know his name, except by looking at the Indictment. Are you making any motion for the disqualification of the Court in this case?

(Mr. Boyd) I am not. The Court knows the facts better than I do. Disqualification is an action that must take place only by the Court per se. If you think you are disqualified, you have the belief for that far better than I do.

(The Court) It is not that at all. Do you have any motion to make on the subject of my disqualification? I don't mind saying very personally that I do not feel in the slightest disqualified by reason of the fact that I signed the Jury list, but if you do, I want to know it at this stage.

(Mr. Boyd) I don't believe that fact is indicative one way or another. The fact that you did is not a controlling factor.

[25] See Brief of Petitioner, page 30.

POOR COPY

BLEED THROUGH

visions would not constitute grounds for quashing the indictment returned against him.[26]

In the Court of Appeals of Maryland, the Petitioner urged as one of the grounds for quashing the indictment against him precisely the same point discussed here. After making a complete and exhaustive review of the matter, the Court of Appeals found that "the objection is without merit".

It is axiomatic that in the absence of a violation of some fundamental principle of justice, a State's determination is conclusive upon the Federal Courts as to the meaning of State law. *Herbert v. Louisiana,* 272 U. S. 312, 316, 81 L. Ed. 271, 272-273 (1926); *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 479-480, 76 L. Ed. 1232, 1238 (1932); *United Gas Co. v. Texas,* 303 U. S. 123, 141-142, 82 L. Ed. 702, 716 (1938). This principle has been applied in those cases in which the contention has been advanced that Negroes have been discriminated against in the selection of grand juries. *Akins v. Texas,* 325 U. S. 398, 400 (footnote 1), 89 L. Ed. 1694, 1695 (footnote 1) (1945). Since the Court of Appeals of Maryland has ruled that the provisions of the Charter and Public Local Laws of Baltimore City and the application of those statutes by the Supreme Bench of Baltimore City

---

[26] Petitioner's admission in this connection seems well founded in the light of Section 709 of the Charter and Public Local Laws of Baltimore City (1938), which provides in part as follows:

> "All the provisions of this sub-division of this Article relating to the mode of drawing and summoning jurors shall be construed as directory merely, and no indictment or presentment for any felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment or presentment, whether after verdict, by confession or otherwise, be stayed or reversed, nor shall any challenge to the array of jurors be allowed because of any failure by the Judges, or the clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; * * *."

are valid as a matter of Maryland Law, we submit that this decision is binding upon this Court.

The only remaining question is whether the Charter and Public Local Laws of Baltimore City, standing alone, violate some fundamental principle of justice. We concede that these statutes present an opportunity for racial discrimination in the formation of grand juries, since these juries must be "selected" by the members of the Supreme Bench of Baltimore City. But it is well settled that this fact—and this fact alone—will not constitute grounds for quashing an indictment returned against a Negro.

The case of *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940) is directly in point. In that case, it appeared that under Texas law, the grand jury was required to be "selected" by jury commissioners who were appointed by the court. Finding that the Texas statutory scheme, standing alone, presented no grounds for quashing the indictment returned against a Negro, this Court said at page 130:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever."

Later cases decided by this Court reinforce the rationale of *Smith v. Texas, supra.* For example, in *Fay v. New York,* 332 U. S. 261, 91 L. Ed. 2043 (1947), and in *Moore v. New York,* 333 U. S. 565, 92 L. Ed. 637 (1948), this Court sustained, as constitutional, the so-called "Blue Ribbon Jury System" which obtains in the State of New York. In the *Moore* case, *supra,* it affirmatively appeared that 150 names were drawn for a jury panel under the supervision of a Justice of the State Supreme Court, and that no Negroes were placed upon that panel. Finding nothing in the background facts which discredited the testimony that there was no practice or intent of discriminating against Ne-

POOR COPY

BLEED THROUGH

groes, this Court sustained the method of selecting the jury against a contention that the jury was the product of racial discrimination.

It thus appears that the contention of the Petitioner relative to the provisions of the Charter and Public Local Laws of Baltimore City, when reduced to its lowest terms, amounts merely to the point that these statutory provisions afford an opportunity for discrimination against Negroes in drawing a grand jury. This contention, as stated above, has been rejected by this Court. We submit, therefore, that the mere fact that the Charter and Public Local Laws of Baltimore City afford an opportunity to discriminate against Negroes in the drawing of a grand jury, does not present grounds for reversing the decision of the Court of Appeals of Maryland.

CONCLUSION

The findings of fact and the conclusions of law made so thoroughly and conscientiously by the trial court and by the Court of Appeals of Maryland are amply supported by substantial evidence in the record of the present case and by the decisions of this Court in past cases, and should, for the reasons set forth in this Brief, be affirmed.

Respectfully submitted,

HALL HAMMOND,
Attorney General,
RICHARD W. CASE,
Asst. Attorney General,
1901 O'Sullivan Bldg.,
Baltimore, Maryland,
For Respondent.

DECISIONS PER CURIAM AND ORDERS FROM JANUARY 31 THROUGH MAY 9, 1949.

JANUARY 31, 1949.

Per Curiam Decision.

No. 429. ZIMMERMAN *v.* MARYLAND. Certiorari, 335 U. S. 870, to the Court of Appeals of Maryland. Argued January 14, 1949. Decided January 31, 1949. *Per Curiam:* The judgment is affirmed. *Akins* v. *Texas*, 325 U. S. 398 (1945). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent. *J. Cookman Boyd, Jr.* argued the cause and filed a brief for petitioner. *Hall Hammond*, Attorney General of Maryland, argued the cause for respondent. With him on the brief was *Richard W. Case*, Assistant Attorney General. Reported below: — Md. —, 59 A. 2d 675.